Supreme Court, U.S.
FILED

041536 MAY 11 2005

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT J. JAFFE, M.D.,

Petitioner,

vs.

KAISER FOUNDATION HOSPITAL, *et al.*,

Respondents.

On Petition For Writ of Certiorari
To the California Court of Appeal
Second Appellate District

PETITION FOR WRIT OF CERTIORARI

ROBERT J. JAFFE, M.D.
22141 Burbank Boulevard, #5
Woodland Hills, CA 91367
Telephone: (818) 489-4120

Petitioner in Pro Se

QUESTION PRESENTED FOR REVIEW

May state courts allow the use of adjudicators who have a direct, personal, substantial, pecuniary interest in a proceeding affecting a physician's right to practice his profession, despite Federal law and U.S. Supreme Court precedent that hold such financial interest violates physicians' rights to an impartial adjudicator, and is therefore repugnant to the Constitution of the United States, that guarantees due process and fair procedure?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

ROBERT J. JAFFE, M.D., Petitioner in pro se

KAISER FOUNDATION HOSPITAL, SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, KAISER HEALTH PLAN, INC., Respondents.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW..... i

PARTIES TO THE PROCEEDING.....ii

TABLE OF CONTENTS..... iii

OPINIONS BELOW.....1

BASIS OF SUPREME COURT JURISDICTION.....1

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE.....2

STATEMENT OF THE CASE.....3

BACKGROUND.....4

JURISDICTION.....6

ARGUMENT.....7

A. Review Should be Granted Because the California Courts' Decisions Are Repugnant to the U.S. Constitution, and Also in Conflict with Federal Law and U.S. Supreme Court Precedent that Require Disqualification of an Adjudicator with a Substantial, Direct and Pecuniary Interest in the Proceeding.....7

B. The California Court Decisions in This Case are Internally Inconsistent and Conflict With Federal Law.....12

C. The U.S. Supreme Court Precedent that Adjudicators in Lawfully Mandadated Adjudicative Hearings be Impartial Must be Safeguarded 16

APPENDICES:

Page

Court of Appeals Opinion, *Jaffe v. Kaiser Foundation Hospital, et al.* (December 1, 2004)..... A-1

Court of Appeals Denial for Rehearing (December 21, 2004).....A-21

Arbitrator's curricula vitae (attached to Request for JudicialNotice, October 12, 2004).....A-35

Yaqub v. Valley Memorial Healthcare System (2004) 122 Cal.App.4th 474.....A-47

Bylaws.....A-66

Page 24 of Petitioner's Appellate Court Opening Brief (Arbitrator's fee)..... A-68

Page 19 of Petitioner's Appellate Reply Brief (Arbitrator's fee) A-70

Page 28 of Petitioner's Appellate Court Opening Brief (re: Clark's dual role as Kaiser's Counsel and legal advisor to ARP).....A-71

Pages 29-30 of Petitioner's Appellate Court Opening Brief (re: denial of voir dire of ARP) A-72

Superior Court's Minute Order, (*Jaffe v. Kaiser Foundation Hospital, et al.*, January 10, 2003).....B-1

Superior Court's denial of Motion to Vacate/New Trial (3/24/03)..... B-8

California Medical Board's Letters B-10

APPENDICES (Continued)

Page

Petitioner's Superior Court Opening Brief, p. 34 (Arbitrator's Fee)..... B-12

Petitioner's Superior Opening Brief, p. 5-6 (Clark's dual role)..... B-14

Petitioner's Superior Opening Brief, p. 20-22 (voir dire of ARP).....B-17

ARP transcripts pp. 12-15 – (voir dire).....B-21

California Supreme Court denial of Petition for Review (February 16, 2005)..... C-1

TABLE OF AUTHORITIES

CASES Page

Aetna Life Insurance Co. v. Lavoie, et al.
475 U.S. at p. 825 [106 S.Ct. at p.1587]..... 9, 10, 11

Brown v. Vance, 637 F.2d 272, 283.....8

Engalla v. Permanente Medical Group, Inc.
(1997) 15 Cal.4th 951.....12

Gibson v. Berryhill, supra, 411 U.S. 564, 579
[93 S.Ct. 1689, 1698].....10

Goldberg v. Kelly, supra, 397 U.S. 254, 267, 271
[90 S.Ct. 1011, 1020, 1022].....3, 6

Haas v. County of San Bernardino (2002)
27 Cal.4th 1017.....8, 11, 13

Hurtado v. Statewide Home Loan Co. (1985)
167 Cal.App.3d 1019, 1023-1025.....10

Liljeberg v. Health Services Acquisition Corp.
1988) 486 U.S. 847, 865.....10

Mathews v. Eldridge, 724 U.S. 319 (1976)..... 3, 6

Tumey v. Ohio (1927) 273 U.S. 510, 523 [47 S.Ct.
437, 441, 71 L.Ed. 749].....8, 9, 10, 11, 13

Ward v. Village of Monroeville (1972) 409 U.S.57, 60
[93 S.Ct. 80, 83, 34 L.Ed.2d 267].....8, 9, 11, 13

Withrow v. Larkin, supra, 421 U.S. 35, 47
[95 S.Ct. 1456, 1464].....9

TABLE OF AUTHORITIES (Continued)

Page

Yaqub v. Valley Memorial Healthcare System,
122 Cal.App.4th at 485.....11, 12, 13, 14, 15, 16

UNITED STATES CONSTITUTION

United States Constitution, Article XIV, Section 1.....2, 6, 7

FEDERAL STATUTES

42 U.S.C. § 11133, 11133(b), 11134(b)..... 3
42 U.S.C. § 11135..... 4
42 USC 11101, *et seq*..... 7
42 USC § 11112, *et seq*..... 4
42 U.S.C. § 1320(a)-7, *et seq*..... 4
42 U.S.C. § 1320c, *et seq*..... 4
28 U.S.C. § 2101(c)..... 1

RULES OF THE UNITED STATES SUPREME COURT

Rule 13.3 1
Rule 10(b).....1
Rule 10(c) 2

CALIFORNIA STATE STATUTES

Canon 2 of the California Code of Judicial Ethics..... 13
California Business & Professions Code § 809, *et seq*..... 7
California Business & Professions § 809.3(c).....15
California Evidence Code § 1701(a)(3).....11

MISCELLANEOUS

The Federal Health Care Improvement Act.....7

CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

Jaffe v. Kaiser Foundation Hospital, et al, Superior Court of California for the County of Los Angeles, Case No. BS 069856, (January 10, 2003) Appendix B-1.

Jaffe v. Kaiser Foundation Hospital, Court of Appeal of the State of California, Second Appellate District, Case No. B166698 (December 1, 2004 Unpublished) Appendix A-1.

BASIS OF SUPREME COURT JURISDICTION

The Court of Appeals, Second Appellate District, entered its judgment on December 1, 2004, Appendix A-1.

On December 16, 2004, Petitioner timely filed a Petition for Rehearing in the Court of Appeals. On December 21, 2004, the Court of Appeals filed an order denying Petitioner a Rehearing. Appendix A-21.

Petitioner timely filed a Petition for Review before the California Supreme Court on January 10, 2005. The California Supreme Court denied Petitioner's Petition for Review on February 16, 1995. Appendix C-1.

The present petition is timely filed under 28 U.S.C. section 2101(c) and under Rule 13.3 of this court.

This application is proper pursuant to U.S. Supreme Court Rule 10(b), as Petitioner seeks review of state court decisions, that conflict with the decision of another state court of last resort and a decision of a U.S. Court of Appeals.

This application is also proper pursuant to Rule 10(c), as Petitioner seeks review of state court decisions, that conflict with relevant decisions of the U.S. Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Constitution of the United States, Amendment XIV, Due Process Clause.

STATEMENT OF THE CASE

Petitioner brings before this court a federal question regarding the required due process and fair procedure afforded to licensed physicians in peer review hearings as provided under the law. The rights of physicians are elucidated in federal law, as provided in 42 U.S.C. 11112, *et seq.* Such protections comport with numerous Supreme Court decisional precedents, which require a fair hearing with the rudiments of due process whenever individuals face loss of a substantial right. *Mathews v. Eldridge*, 724 U.S. 319 (1976); see also *Goldberg v. Kelly*, *supra*, 397 U.S. 254, 267, 271 [90 S.Ct. 1011, 1020, 1022] (administrative hearings demand rudimentary due process, and an "impartial decision maker is essential.")

When a physician is subject to a hearing regarding his right to practice his profession, court decisions that deny him the rudimentary due process of an *impartial decision maker* are repugnant to the Constitution of the United States, contrary to federal law and U.S. Supreme Court precedent and therefore are proper grounds upon which to seek certiorari review by the United States Supreme Court.

This particular case arises from the decision by associated medical entities, (hereinafter referred to collectively as Kaiser) to terminate Petitioner's medical staff membership and clinical privileges.

Hospitals and other health care entities that adversely affect a physician's membership or clinical privileges must report these actions to the State Board of Medical Examiners, which in turn must report them to the United States Department of Health & Human Services (DHHS). 42 U.S.C. sections 11133, 11133(b), 11134(b). Additionally, hospitals have a duty, pursuant to the Health Care Quality Improvement Act, to request information about a physician from the DHHS before they initially grant the physician

privileges (and every two years thereafter). 42 U.S.C. section 11135. Once information concerning an adverse privilege determination is reported to DHHS, the DHHS is empowered through the Medicare and Medicaid Patient Program Protection Act and the Peer Review Improvement Act, 42 U.S.C. sections 1320(a)-7 et seq., and 42 U.S.C. sections 1320c, et seq., to initiate investigations of physicians and exclude them from the Medicare and/or Medicaid programs.

Therefore, as a result of Kaiser's actions, Petitioner was denied not only his right to practice medicine at Kaiser, but also faced limitations to practice at other medical institutions.

BACKGROUND

Petitioner is a board certified internist. From 1977 to 1994 he was an attending physician with Kaiser Foundation Hospital, (also affiliated with the Kaiser Foundation Health Plan, Inc.) He was a partner with the affiliated Southern California Permanente Medical Group for 17 years.

From April 21, 1995 through September 18, 1997, Kaiser held a "formal hearing" to hear on the matter of Petitioner's loss of privileges to practice medicine at Kaiser. This hearing was held before an Arbitrator who acted as fact finder and decision maker, despite the fact that he had a direct financial interest in the issuance of findings against Petitioner. Kaiser had chosen the Arbitrator and paid the Arbitrator's fee 100 percent. The Arbitrator's full-time profession and business was predominantly the representation of hospitals and hospital medical staffs in disputes with individual staff physicians and the preparation of medical staff bylaws. Appendix A-33 through A-40. On December 15, 1997 the Arbitrator upheld Kaiser's termination of Petitioner's hospital privileges.

On or about March 23, 1998, Petitioner sought reconsideration of this termination before the Kaiser Appellate Review Panel (also referred to as ARP). Petitioner timely exhausted his administrative remedies by raising the issue before the Appellate Review Panel that the Arbitrator was biased because Respondents had chosen him and paid his fee 100 percent. Petitioner stated: "The Arbitrator was and is a practicing attorney who represents hospitals only. He does not represent physicians. In fact, the arbitrator was paid by and employed by Kaiser Foundation Hospital, Panorama City."

The Medical Board of California conducted its own investigation of the Kaiser charges at issue, and *twice* affirmed that Appellant's medical practice had not deviated from the accepted standard of care in the Community. Appendix B-10 and B-11. At no time did the California Medical Board or any other licensing agency take any action against Petitioner's medical license.

Petitioner's Writ of Mandamus in this matter, filed on December 16, 2001, was denied by the superior court on January 10, 2003. Appendix B-1. Appellant's motion for a new trial/vacate judgment was denied on March 24, 2003. Appendix B-8. Appellant appealed before the California Court of Appeal, Second Appellate District. Petitioner argued that Respondents had denied him fair procedure, fair hearings, an impartial adjudicator, and that the findings were not supported by substantial evidence. The appeals court affirmed the superior court's decision. Appendix A-1. Petitioner's Request for California Supreme Court Review filed on January 10, 2005 was denied on February 16, 2005. Appendix C-1.

JURISDICTION

A decision upholding Kaiser's action against Petitioner that was issued by the California Courts has now been affirmed by the action of the court of last resort in this state. This decision is in conflict with the relevant decisions of this court which demand that hearings regarding the fundamental right to earn a living by one's licensed profession include an impartial decisionmaker. See *Mathews, supra*, quoting *Goldberg, supra* ("the hearing must include . . . an impartial decision maker.") This decision is also repugnant to the Fourteenth Amendment to the United States Constitution which guaranties due process and equal protection under the laws for such hearings.

Furthermore, the decision against Petitioner issued by the California Court of Appeals, Second District, is in conflict with decisional law issued by the California Court of Appeals, Sixth District Opinion (review denied by California Supreme Court) and in conflict with U.S. Supreme Court precedent as described above and elucidated below. The Appellate Court Second District's decision upholding the action taken against Petitioner endorses health-entity use of biased adjudicators in hearings that affect an individual physician's right to earn a living by his profession.

Petitioner therefore asks this court to grant his petition for a writ of certiorari in order to reconcile these state actions with applicable federal law and U.S. Supreme Court precedent, and to correct the result that, if undisturbed, will provide medical entities unlimited power to terminate a physician without regard to due process and fair procedure.

ARGUMENT

A. Review Should Be Granted Because the California Courts' Decisions are Repugnant to the U.S. Constitution, and also in Conflict With Federal Law and U.S. Supreme Court Precedent that Require Disqualification of an Adjudicator With a Substantial, Direct and Pecuniary Interest in the Proceeding.

A physician is entitled to due process and fair procedure in hearings regarding the revocation of hospital privileges per constitutional and common law, and per California Business & Professions Code § 809, et seq.

The United States Constitution, Article XIV, Section 1 states: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Federal Health Care Improvement Act, 42 USC 11101 et seq., and California Business & Professions Code § 809, et seq. both require impartial adjudicators and fair procedure in accordance with due process for hearings regarding the revocation of hospital privileges.

Petitioner had argued before the superior court that the fact that Kaiser paid the Arbitrator's fee 100 percent caused a bias that was too high to guaranty fair procedure. Appendix B-12 . Petitioner also argued this issue before the Appellate Court. Appendix A-68 and Appendix A-70. Respondents admitted they paid the Arbitrator's fee in their superior court and Appellate court reply briefs. Respon-

dents' Appellate Reply Brief (page 21, paragraph 2) states: "Respondents appropriately paid the Arbitrator's fee . . ."

The superior court's Opinion incorrectly held that Petitioner must show "actual" bias and financial interest based on the "outcome" of the hearing in order to prevail on a claim of bias arising from financial interest. (Opinion Appendix B-5 and B-6.) This holding is contrary to the Federal Court of Appeal, Fifth Circuit, the California Appellate Court, Sixth District, and the precedent of the Unites States Supreme Court on this issue. See, e.g. *Brown v. Vance*, 637 F.2d 272, 283 ("we need find no instance of actual judicial bias to hold the fee system constitutionally infirm)." The court wrote, "the test is whether a fee system presents a 'possible temptation to the average man as judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused.'" (*Id.* at p. 282, quoting *Tumey*, *supra*, 532 [47 S.Ct. 437, 444], and *Ward*, *supra*, 60 [93 S.Ct. 80, 83].)

Haas v. County of San Bernardino (2002) 27 Cal.4th 1017 (which Petitioner cited in his Appellate Court Reply Brief and in his Motion for Rehearing) summarized the governing principles as follows:

"Due process requires fair adjudicators in courts and administrative tribunals alike. While the rules governing the disqualification of administrative hearing officers are in some respects more flexible than those governing judges, the rules are not more flexible on the subject of financial interest." (Emphasis added.) See also, *Goldberg v. Kelly*, *supra*, 397 U.S. 254, 267, 271 [90 S.Ct. 1011, 1020, 1022] (administrative hearings demand rudimentary due process, and an "impartial decision maker is essential.")

Of all the types of bias that can affect adjudication, pecuniary interest has long received the most unequivocal condemnation and the least forgiving scrutiny. As the high court explained in *Tumey v. Ohio* (1927) 273 U.S. 510, 523 [47 S.Ct. 437, 441, 71 L.Ed. 749] (*Tumey*), "[a]ll questions of judicial qualification may not involve constitutional validity . . . but it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case."

This high court has "ma[de] clear that [a reviewing court is] not required to decide whether in fact [an adjudicator challenged for financial interest] was influenced, but only whether sitting on the case . . . 'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" (*Aetna Life Ins. Co. v. Lavoie, et al., supra*, 475 U.S. at p. 825 [106 S.Ct. at p. 1587], quoting *Ward v. Village of Monroeville* (1972) 409 U.S. 57, 60 [93 S.Ct. 80, 83, 34 L.Ed.2d 267] (*Ward*), and *Tumey, supra*, 273 U.S. at p. 532 [47 S.Ct. at p. 444].) "[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." (*Tumey, supra*, 273 U.S. at p. 532 [47 S.Ct. at p. 444].)

In *Withrow v. Larkin, supra*, 421 U.S. 35, 47 [95 S.Ct. 1456, 1464], the high court held that a claim of bias based on the combination of investigative and adjudicative functions in a state medical board had to "overcome a presumption of honesty and integrity in those serving as adjudicators . . ." But never, in the years since *Withrow*, has the high court so much as hinted that a litigant seeking to disqualify an adjudicator <u>for financial interest</u> must overcome

any such *presumption*. To the contrary, the high court has repeatedly and unambiguously held that courts do not, when faced with a claim of bias arising from financial interest, decide whether the adjudicator was in fact influenced. The standard continues instead to be that set out in *Tumey*, *supra*, 273 U.S. 510, 532 [47 S.Ct. 437, 444], namely, whether the adjudicator's financial interest would offer a possible temptation to the average person as judge not to hold the balance nice, clear and true. (*Aetna*, *supra*, 475 U.S. at pp. 824-825 [106 S.Ct. at pp. 1586-1587]; *Connally v. Georgia* (1977), 249 [97 S.Ct. 546, 548, 50 L.Ed.2d 444].) Indeed, applying this standard in *Liljeberg v. Health Services Acquisition Corp.* (1988) 486 U.S. 847, 865, footnote 12 [108 S.Ct. 2194, 2205, 100 L.Ed.2d 855], the court went so far as to vacate a decision entered by a judge who was not conscious of the circumstances giving a university, on whose board of trustees he served, a financial interest in the case.

The rule declared in these civil and criminal cases also applies to administrative proceedings. In this context, the high court has written: "It is [Page 27 Cal.4th 1027] sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes. . . . It has also come to be the prevailing view that '[m]ost of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators.'" (*Gibson v. Berryhill*, *supra*, 411 U.S. 564, 579 [93 S.Ct. 1689, 1698.]

The adjudicator in the instant case not only ruled on admissibility of evidence, but also weighed the evidence, and made the ultimate decision regarding Appellant's fate. See *Hurtado v. Statewide Home Loan Co.* (1985) 167 Cal.App.3d 1019, 1023-1025 (finding that the need for disqualification is greater when the adjudicator acts as fact finder in addition to ruling on legal matters.) The presiding officer who is at the *same time* the sole trier of fact must not only be impartial, but

must also not be subject to so much as a possibility or appearance of bias. *Haas, supra* at page 1030 (financial interest risks probability and appearance of bias in favor of the party who pays the arbitrator); see also, *Yaqub v. Valley Memorial Healthcare System*, 122 Cal.App.4th at 485, quoting *Haas, supra*: "The Court's inquiry . . . is not whether a particular man has succumbed to temptation, *but whether the economic realities make the design of the fee system vulnerable to a 'possible temptation' to the 'average man' as judge*." (Emphasis added.)

California Evidence Code section 170.1, subdivision (a)(3), states that a judge must be disqualified if he or she "has a financial interest in the subject matter in a proceeding or in a *party* to the proceeding." (Emphasis added.)

The U.S. Supreme court requires disqualification of an adjudicator where the financial interest is characterized as "direct, personal, substantial, [and] pecuniary," as distinguished from "slight." (*Aetna, supra*, 475 U.S. 813, 825-826 [106 S.Ct. 1580, 1587-1588], quoting *Ward, supra*, 409 U.S. 57, 60 [93 S.Ct. 80, 83], and *Tumey, supra*, 273 U.S. 510, 523 [47 S.Ct. 437, 441].)

Certainly, the Arbitrator's pay received from Respondents in the instant case cannot be dismissed as "slight" as the Hospital paid the Arbitrator's fee over the entire 32 hearing sessions, spanning two and one-half years. This type of compensation can only be characterized as "direct, personal, substantial, [and] pecuniary".

It is reasonable to presume that, with this type of compensation, the Arbitrator would be tempted to act on behalf of Kaiser's interests, despite the objective evidence placed before him at the hearings. It is also reasonable to presume that the Arbitrator would be further tempted to rule on behalf of Kaiser in this case to further his career specialty

of representing hospitals and medical staffs. (See Arbitrators' curricula vitae attached as exhibits Petitioner's Request for Judicial Notice. Appendix A-35 through Appendix A-46.)

Mechanisms to reduce the bias of adjudicators are not without precedent. For example, in *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, the California Supreme Court called for Kaiser to revise the mechanism it used to choose arbitrators for its medical malpractice cases.

B. The California Court Decisions in This Case are Internally Inconsistent and Conflict With Federal Law.

The decision upheld by the California Appellate Court, Second Appellate District, in this case, that the litigant must show "actual bias" and financial interest based on the "outcome" of the hearing in order to prevail on an allegation of pecuniary interest in violation of due process is not only in direct conflict with the above-cited cases but also directly conflicts with the California Appellate Court, Sixth Appellate District's recent holding in *Yaqub v. Valley Memorial Healthcare System* (2004) 122 Cal.App.4th 474,[1]. (Review denied by California Supreme Court, January 12, 2005).

The holding in *Yaqub* (Appendix A-47) on this matter is consistent with the U.S. Supreme Court's precedent in

---

[1] *Yaqub* was published three days before Appellant's Reply Brief was due. Therefore Appellant was unable to cite *Yaqub* in his Appellate Reply Brief. However, Petitioner filed a Request under California Evidence Code § 451(a) for the Appellate Court to Take Judicial Notice of *Yaqub*, (citing *Haas*, supra) (Appendix A-21 through A-34). The Appellate Court denied Petitioner's request to take judicial notice of *Yaqub* and *Haas, supra*, with no reason stated. Petitioner, nevertheless cited *Yaqub* at the hearing and addressed *Yaqub*, and its citations to *Haas*, in Petitioner's Petition for Rehearing before the Appellate Court.

Tumey and *Ward*. *Yaqub* holds that no evidence of "actual prejudice" or of a direct financial interest in the "outcome" of the case is required for a showing of a financial interest in violation of due process. *Yaqub* states that the Court's inquiry is *not whether* a particular man has succumbed to temptation, but whether the economic realities make the design of the fee system vulnerable to a "possible temptation" to the "average man" as judge.'" *Yaqub* states:

> "We also acknowledge that there was no evidence of actual prejudice or of a direct financial interest in the outcome of the case. As both the ARP and the trial court observed, 'the administrative record shows that the present hearing was conducted fairly and even-handedly by the presiding officer'. . . . The court further noted that in a previous {Slip Opn. Page 13} proceeding conducted by Justice Agliano the Hearing Panel had ruled in favor of the physician. Nevertheless, the Supreme Court emphasized in *Haas* that 'the risk of bias caused financial interest need not manifest itself in overtly prejudiced, automatic rulings in favor of the party who selects and pays the adjudicator.' *(Haas, supra,* 27 Cal.4th at p. 1030.) 'The Court's inquiry . . . is not whether a particular man has succumbed to *temptation*, but whether the economic realities make the design of the fee system vulnerable to a 'possible temptation' to the 'average man' as judge.' (*Id.* at p. 1029.)"
>
> . . .
>
> "Code of Civil Procedure section 170.1, subdivision (a)(3), states that a judge must be disqualified if he or she 'has a financial interest in the subject matter in a proceeding or in a party to the proceeding.' And Canon 2 of the Code of Judicial Ethics states that a judge 'shall avoid impropriety and the appearance of impropriety in all of the judge's activities.' (Italics added.) The commentary to this canon provides an

> objective test for the appearance of impropriety: The question is not whether the judge is actually biased, but 'whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence.'" (See, e.g., *Hall v. Harker* (1999) 69 Cal.App.4th 836, 841. . . ." (Emphasis added.)

In addition to the issue of bias arising from the fact that the Hospital had paid the Abitrator's fee 100%, Petitioner's case holds another factor in common with *Yaqub* that compounds the situation of an adjudicator's financial interest - the fact that Respondent had chosen an Arbitrator whose career specialty was that of an attorney who serves as general counsel to hospitals and one who frequently serves as hearing officer or Arbitrator to hospitals and medical staffs. (See the Arbitrator's 1994 curriculum vitae at the time at issue and his curriculum vitae currently posted on the Internet (Appendix A-35 through A-46), both attached as exhibits to Petitioner's Request for the Appellate Court to Take Judicial Notice of *Yaqub*. (Appendix A-21 through A-34.) In *Yaqub*, in addition to the fact that Salinas Hospital had paid the hearing officer's fee 100 percent, the hearing officer in *Yaqub*, "had presided over a number of Fair Hearing proceedings at the hospital, resulting in 'significant financial gain' to him, which presented another likely source of bias in the hospital's favor."

Another factor in common with *Yaqub*, that Petitioner had argued before the superior court (Appendix B-14) and Appellate Court (Appendix A-71) was that at Petitioner's Appellate Review Board Hearing, Respondents had appointed their own attorney as legal advisor to the ARP, when Petitioner was *not* represented by counsel.

Likewise in *Yaqub,* Salinas Hospital had similarly appointed its own attorney as legal advisor to their ARP where the physician was not represented by counsel.

The *Yaqub* court (California Sixth Appellate District) held p. 486:

> "We do caution, however, that if an appellate review hearing does take place without counsel for either side, it would strain the bounds of due process to allow the hospital's attorney, who took an active role in assisting the MEC to bring charges against appellant, to serve as advisor to the board in the hearing. [City attorney's interactions with board on other occasions suggested probable influence and appearance of unfairness (citations omitted)." (Emphasis added.)

Petitioner further argued before the superior court (Appendix B-17) and appellate court (Appendix A-72), that Kaiser impermissibly denied him from making an effective ~~chal~~lenge to this bias during voir dire. (Appendix B-21 - ARP.Tr.12-15:19-3). Petitioner argued that the dual role held by Kaiser's counsel and Legal Adviser to the ARP violated California Business & Professions § 809.3(c) ("No peer review body shall be represented by an attorney if the licentiate is not so represented.") At the Appellate Review Board hearing, Petitioner objected to the fact that Respondents had appointed their own hospital's attorney as "legal advisor" to the panel and that all three members of the ARP panel were Kaiser appointed Kaiser affiliates:

> "DR. JAFFE: Everyone here today -- the panelists, Ms. Clark, Dr. Schottinger -- have a strong affiliation with Kaiser Hospital, Kaiser Foundation Hospital, and the Medical Group, and I take issue with having the attorney of staff and strong affiliates with the

medical group and the hospital as those who will stand to judge me. . . ." Arp.Tr.27:11-19) [2]

The Appellate Court's Opinion (Appendix A-15) that Petitioner must show evidence of "actual" bias on the part of the ARP under these circumstances is in direct conflict with the decision of the Appellate Court in *Yaqub*, where the *Yaqub* court found that *no* evidence of *actual* bias need be shown under these circumstances. The *Yaqub* court found it a violation of due process for the hospital to appoint its own attorney as legal advisor to the ARP when the physician was not so represented. The *Yaqub* court held that this situation "suggested probable influence and appearance of unfairness."

C. The U.S. Supreme Court Precedent that Adjudicators in Lawfully Mandated Adjudicative Hearings be Impartial Must be Safeguarded.

The Government's role is to protect its individual citizens through its laws. Yet, California courts have allowed medical entities to approach lawfully mandated peer review hearings without the required fairness and due process that apply to all other adjudicative hearings under the law.

When the adjudicator has a financial interest in the proceeding he cannot be impartial. This creates a bias that is repugnant to the Constitution of the United States and thus cannot be tolerated much less endorsed by court decisions.

An individual's career fate cannot be placed into the hands of an adjudicator who stands to profit financially by ruling against him.

---

[2] Respondents had unfairly composed the ARP panel entirely with Kaiser appointed Kaiser affiliates when the Bylaws stated that only *one* member must be Kaiser affiliated (Appendix A-66).

Where there are conflicts in the opinions of the courts as to the right to impartial adjudicators, the rule of law demanding impartial adjudicators in administrative hearings must be safeguarded.

To protect against adjudication by financially interested parties, Petitioner respectfully requests the United States Supreme Court to grant Petitioner's Writ of Certiorari.

DATED: May 10, 2005

Respectfully submitted,

/s/ Robert J. Jaffe, M.D.
ROBERT J. JAFFE, M.D.
Petitioner and Appellant, in Pro Se

(2) Supreme Court, U.S.
FILED

041536 MAY 11 2005

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT J. JAFFE, M.D.,

Petitioner,

vs.

KAISER FOUNDATION HOSPITAL, *et al.*,

Respondents.

On Petition For Writ of Certiorari
To the California Court of Appeal
Second Appellate District

PETITION FOR WRIT OF CERTIORARI APPENDIX

ROBERT J. JAFFE, M.D.
22141 Burbank Boulevard, #5
Woodland Hills, CA 91367
Telephone: (818) 489-4120

Petitioner in Pro Se

Filed 12/1/04 Jaffe v. Kaiser Foundation Hosp. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, Rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or order published, except as specified by Rule 977(b). This opinion has not been certified for publication or ordered published for purposes of Rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION FIVE

ROBERT J. JAFFE,
Plaintiff and Appellant

B166698

(Los Angeles County
Super. Ct. No.BS069856)

v.

KAISER FOUNDATION
HOSPITAL et al.,
Defendants and Respondents.

APPEAL from a judgment and an order of the Superior Court of Los Angeles County, David P. Yaffe, Judge. Affirmed.

Robert J. Jaffe, in propria persona, for Plaintiff and Appellant
Foley & Lardner, Lowell C. Brown, Sarah G. Benator, and Lauren Reisman, for Defendants and Respondents.

I. INTRODUCTION

Robert Jaffe, M.D., plaintiff, appeals from a judgment denying his administrative mandate petition to compel the reinstatement of his medical staff membership and clinical privileges at Kaiser Foundation Hospital—Panorama City. Plaintiff also appeals from an order denying his motion to vacate that judgment. Plaintiff named as defendants: Kaiser Foundation Hospital—Panorama City; Southern California Permanente Medical Group; and Kaiser Health Plan, Inc. The administrative action at issue was taken by Kaiser Foundation Hospital—Panorama City. For purposes of clarity, we will refer to the hospital as defendant. However, our legal conclusions apply equally to the remaining defendants. We affirm both the judgment and the order denying plaintiff's motion to vacate.

II. BACKGROUND

A. Medical Staff Bylaws

Defendant's medical staff bylaws encompass the investigation and adjudication of allegations of improper conduct by medical staff. The first step is investigatory. Defendant's Executive Committee or its designee: conducts an investigation; notifies the subject of the investigation; prepares a written report; and recommends action. The recommended action may include suspension of clinical privileges and revocation of staff membership. In addition, the Executive Committee has discretion to implement summary suspension at any time. When a recommendation to revoke membership and suspend privileges is made, the staff member is entitled to written notice of the adverse recommendation and of the right to request a hearing before the Executive Committee. Defendant's bylaws provide in that regard: "Procedural Rights. Any recommendation by the Executive Committee . . . which constitutes grounds for a

hearing . . . shall entitle the staff member to the procedural rights provided in [the hearing and appeals procedure section]. In such cases, the Hospital Administrator shall give the member written notice of the adverse recommendation and the right to request a hearing [before an arbitrator] in the manner specified in [the hearing and appeals procedure section]."

In addition, the bylaws provide for an informal attempt to resolve the issues. They state: "To facilitate the resolution of interprofessional issues at an early stage, a member who is entitled to the procedural rights provided in [the hearing and appeals procedure section] may request an informal hearing before the Executive Committee. The request shall be in writing and shall state the specific reasons and the evidence which supports the request. The Executive Committee shall fix the time and place for the hearing as soon as the committee reasonably may be convened, but, preferably, on a date within ten (10) working days after receipt of the request. The member shall be entitled to be accompanied by and represented at this closed, informal hearing only by a physician, dentist or podiatrist licensed to practice in the State of California who is not an attorney at law and who is, preferably, a member in good standing of the Professional Staff."

B. Peer Review Proceedings

On April 18, 1994, defendant's Medical Staff Credentials and Privileges Committee recommended that the Executive Committee investigate plaintiff's practice. An investigation ensued. On August 1, 1994, the Executive Committee recommended termination of plaintiff's medical staff membership and clinical privileges. The Executive Committee also summarily suspended plaintiff's privileges pending his appeal. On August 2, 1994, plaintiff was given notice of the Executive Committee's recommended action,

his summary suspension, and his rights to both a formal and an informal hearing. Defendant submitted a Business and Professions Code[1] section 805 report to the Medical Board of California regarding the suspension of plaintiff's staff privileges pending any appeal of the termination recommendation. Summary suspension of medical privileges is authorized by section 809.5.[2] Plaintiff requested both an informal and a formal hearing. The informal hearing was held on August 15, 1994. Following the informal hearing, the Executive Committee voted to uphold its recommendation.

The formal hearing, conducted before an arbitrator, commenced on April 24, 1995, and continued to September 18, 1997. The arbitrator's ruling, issued on December 15, 1997, upheld defendant's decision to revoke plaintiff's staff membership and clinical privileges. The arbitrator found that between 1986 and 1994: plaintiff's treatment of 12 patients had been below the community standard of care; plaintiff had prescribed excessive medication in 2 of those cases; in 1 of the 2 excessive medication cases, plaintiff administered excessive steroid injections; medical record entries were inadequate, deficient, or problematic in 6 cases; and plaintiff had, on at least 1 occasion, used a single syringe to inject multiple patients, a practice not only below the community standard of care, but "intolerable" and exhibiting "an astonishing lack of judgment." The arbitrator stated his findings were based on the individual cases presented. The findings also noted an ongoing pattern of indifference or

---

[1] All further statutory references are to the Business and Professions Code except where otherwise noted.

[2] Section 809.5, subdivision (a) states in pertinent part, "[A] peer review body may immediately suspend . . . clinical privileges . . . where the failure to take that action may result in an imminent danger to the health of any individual . . . ."

defiance by plaintiff concerning defendant's policies, procedures, and directives.

Plaintiff appealed the arbitrator's decision to defendant's Appellate Review Panel. In June 1998, the three-member Appellate Review Panel unanimously upheld the arbitrator's decision. The Appellate Review Panel concluded a preponderance of the evidence in the record supported findings: plaintiff had "repeatedly failed to adhere to the policies and procedures and standards of quality care and service" established by defendant. The appellate panel further found: "[Plaintiff's] pattern of failures included: failure to adhere to universal precautions, *e.g.*, re-use of syringes; failure to ensure patient's health and safety by placing patients in potential jeopardy or at risk by prescribing inappropriate medications, including improper volume of medication orders, *e.g.*, benzodiazepine (case NJ); Tylenol with codeine (case JM), multiple steroid injections (case BF), and suboptimal choice of antibiotics in a seriously compromised patient (case CW); failure to assure continuity of care by failing to order and/or record appropriate laboratory tests (case SS); indecipherable and inadequate medical record charting and documentation; and inadequate evaluation and management of cases, contrary to Hospital's guidelines and protocols." Following the Appellate Review Panel's decision, defendant's board of directors terminated plaintiff's staff membership and privileges.

Plaintiff filed his writ of administrative mandate petition on June 7, 2001. The trial court denied the petition. The trial court also denied plaintiff's motions for a new trial or to vacate the judgment. This appeal followed.

III. DISCUSSION

A. Standard of Review

Code of Civil Procedure section 1094.5 (section 1094.5) allows for review by mandate of the hospital's administrative decision. (*Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, 814-817; see *Pomona College v. Superior Court* (1996) 45 Cal.App.4th 1716, 1722.) Section 1094.5, subdivision (a) describes the administrative writ proceeding thusly, "Where the writ is issued for purposes of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury." Section 1094.5, subdivision (b) provides in pertinent part: "The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. . . ." Section 1094.5, subdivision (d) states, "[I]n cases arising from private hospital boards or boards of directors of districts organized pursuant to The Local Hospital District Law, . . . or governing bodies of municipal hospitals . . . , abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." (*Hongsathavij v. Queen of Angels etc. Medical Center* (1998) 62 Cal.App.4th 1123, 1136; *Bonner v. Sisters of Providence Corp.* (1987) 194 Cal.App.3d 437, 444.)

As the Court of Appeal succinctly stated in *Bonner v. Sisters of Providence Corp., supra,* 194 Cal.App.3d at page 444: "When reviewing a final administrative order, the trial court considers the record of the proceedings before the

administrative board. (Code Civ. Proc., § 1094.5, subd. (a).)" The standard of review for the trial court is as follows: "'[T]he reviewing court must uphold the hospital judicial review committee's decision unless administrative findings viewed in light of the entire record are so lacking in evidentiary support as to render them unreasonable.' (*Gaenslen v. Board of Directors* [(1985)] 185 Cal.App.3d [563,] 572.) 'Under the substantial evidence test, it is not the function of reviewing courts to resolve differences of medical judgment.' (*Cipriotti v. Board of Directors* (1983) 147 Cal.App.3d 144, 154 [].)" (*Bonner v. Sisters of Providence Corp., supra,* 194 Cal.App.3d at p. 447.) Our standard of review is the same. We independently review the administrative record to determine whether defendant's findings are supported by substantial evidence in light of the record as a whole. (*Hongsathavij v. Queen of Angeles etc. Medical Center, supra,* 62 Cal.App.4th at pp. 1136-1137; *Bonner v. Sisters of Providence Corp., supra,* 194 Cal.App.3d at p. 444.) Our colleagues in Division Two of this appellate district have explained "[A]n appellate court must uphold administrative findings unless the findings are so lacking in evidentiary support as to render them unreasonable. (*Oskooi v. Fountain Valley Regional Hospital* (1996) 42 Cal.4th 233, 243 []; *Gaenslen v. Board of Directors, supra,* 185 Cal.App.3d at p. 572.)" (*Hongsathavij v. Queen of Angels etc. Medical Center, supra,* 62 Cal.App.4th at p. 1137.) In addition, where the facts are undisputed, we independently evaluate fair hearing claims. (*Southern Cal. Underground Contractors, Inc. v. City of San Diego* (2003) 108 Cal.App.4th 533, 542; *Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1442-1444.)

B. Plaintiff's Briefs on Appeal

Plaintiff raises numerous arguments by way of reference to his opening brief filed in the trial court. Rather than brief those arguments, he incorporates them from papers

filed below. In addition, these and other arguments are not supported by meaningful or, at times any, citations to the record or to pertinent legal authority. These issues have been forfeited. (*Santa Monica Rent Control Bd. v. Pearl Street, LLC* (2003) 109 Cal.App.4th 1308, 1313, fn. 6; *Garrick Development Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320, 334; *Balesteri v. Holler* (1978) 87 Cal.App.3d 717, 720-721.) With respect to plaintiff's appeal from the order denying his motion to vacate the judgment, he has not raised any cognizable issue. Therefore, any issue that could have been raised has been waived and the order denying the motion to vacate will be affirmed. (*Building etc. Assn. v. Richardson* (1936) 6 Cal.2d 90, 102; *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (2002) 95 Cal.App.4th 709, 713, fn. 2.)

C. The Informal Hearing

Plaintiff devotes a significant portion of his brief to arguing multiple "section 809 violations" occurred during the informal hearing held at his request and pursuant to defendant's bylaws. Plaintiff made no request to continue the informal hearing by reason of any violations of section 809. Plaintiff has not shown that he raised this issue at the time of the informal hearing. If he failed to timely raise the issue in the administrative proceedings, the objection is waived. (*Alameida v. State Personnel Bd.* (2004) 120 Cal.App.4th 46, 53; *People ex rel. Dept. of Transportation v. Cole* (1992) 7 Cal.App.4th 1281, 1286; *City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1018-1022.)

Even if the argument is not waived, we conclude section 809 et seq. was inapplicable. Section 809 et seq. governs a physician's right to a hearing after a hospital proposes to take adverse action against a medical staff member. (§ 809; *Sahlolbei v. Providence Healthcare, Inc.*

(2003) 112 Cal.App.4th 1137, 1147-1148.) The trial court found the informal hearing was not subject to the procedural requirements of section 809 et seq. We agree. Plaintiff's right to a hearing that employed the procedural due process protections codified in section 809 et seq. did not arise until *after* the informal investigation activity and the informal hearing were concluded. (§ 809, subd. (a); see *Sahlolbei v. Providence Healthcare, Inc., supra,* 112 Cal.App.4th at pp. 1148-1151.)

D. Peer Review Activities

Plaintiff argues certain evidence was withheld from defendant's Executive Committee. However, the issue before us is the validity of the final administrative decision of the Appellate Review Panel, which upheld the arbitrator's decision following the formal hearing. That determination is the "final administrative order or decision" referred to in section 1094.5. (§ 1094.5, subd. (a); *Hongsathavij v. Queen of Angels etc. Medical Center, supra,* 62 Cal.App.4th at pp. 1135-1136.)

E. The Arbitration Hearing

1. The outside reviewer

Plaintiff argues a fair procedure violation occurred in that defendant withheld evidence it tampered with an "outside reviewer," Dr. Ronald K. Nudelman. Executive Committee chairperson Dr. Joanne Schottinger asked Dr. Nudelman to review specific patient charts and to give his opinion as to the quality of care at issue in light of community standards. Plaintiff relies on Dr. Schottinger's testimony at the arbitration hearing: "[Plaintiff's counsel]: Q[.] Now, doctor, when you—did you write a letter to Dr. Nudelman? Because he wrote you. His exhibit, which is exhibit 89, is addressed to you, and it appears that, from the

letter, and particularly the last page, which refers to three questions on your part, that you wrote him some sort of a letter. Did you write him a letter? [¶] A[.] There was a cover letter sent with the charts, telling him that the charts were coming, and we asked him to address the issue of community standards outside of Kaiser standards on several questions. [¶] [Plaintiff's counsel]: That letter was not furnished in discovery, and I would like to look at that letter. [Plaintiff's counsel then asked defense counsel,] Do you happen to have it here today[?] [¶] [Defense counsel]: No. [¶] [Plaintiff's counsel]: Assuming we come back tomorrow, will you bring it tomorrow? [¶] [Defense counsel]: I've never seen it. [¶] [Plaintiff's counsel]: I'd like to see it." At that point, plaintiff's counsel turned to a different subject.

Plaintiff subsequently placed the letter in question in evidence. That letter, which is addressed to Dr. Nudelman from Dr. Schottinger states as follows: "Thank you for agreeing to review the selected medical records . . . . As you know, the Executive Committee of the Professional Staff of Kaiser Foundation Hospitals, Panorama City, has requested your services to conduct an independent review of the quality of care provided by the subject physician, Robert Jaffe, MD, for each of the specific cases reflected in the medical records in relation to community standards of care. In this regard, we would also appreciate specific comment on the following issues: [¶] [Medical Record Number 2835614:] Management of diabetic complications including ulcer and proteinuria. [¶] [Medical Record Number 3197473:] Management of a patient with a prosthetic heart valve on coumadin undergoing invasive procedures. [¶] [Medical Record Number 7115574:] Initial management of CHF in the ER and management of positive blood culture upon notification by laboratory. [¶] [Medical Record Number 6817084:] Management of resistant bacteria in pneumonia. [¶] [Medical Record Number 6759778:] Frequency of

multiple steroid injections. [¶] [Medical Record Number 7174143:] Management of anemia, hematuria and falling in a patient on coumadin. [¶] [Medical Record Number 6030542:] Management of coumadin therapy after one episode of atrial fibrillation." The letter continues: "In addition, we would like your opinion on the community standard regarding: [¶] 1. Reuse of syringes after injection for subsequent injections upon change of needles. [¶] 2. Appropriate intervals for monitoring patients on coumadin with PT tests. [¶] 3. Appropriate maximum dosages of halcion."

Plaintiff later declined to cross-examine Dr. Nudelman. At the May 15, 1996, hearing the following occurred: "The arbitrator: . . . And the record should also reflect that I was informed . . . that Dr. Jaffe was waiving his right to cross-examine Dr. Nudelman. [¶] Is that correct?" Plaintiff's counsel responded, "Right." In closing argument before the arbitrator, plaintiff argued Dr. Schottinger's letter to Dr. Nudelman: was provided to plaintiff "at a very late date"; improperly hinted at the perceived problem, thereby precluding a truly unbiased assessment by Dr. Nudelman; and inappropriately revealed the name of the physician under review. On appeal, plaintiff argues, "The fact that [defendant's] inappropriately instructed and tampered-with 'outside' reviewer *testified*, as [defendant's] expert witness, at the Arbitration further violated [plaintiff's] fair procedure rights." (Orig. italics.)

No fair procedure violation occurred. Plaintiff directed the arbitrator's attention to the letter and argued its effect on Dr. Nudelman's assessment. Plaintiff declined to cross-examine Dr. Nudelman. The evidence that Dr. Nudelman's review was arguably biased as a result of Dr. Schottinger's letter was before the arbitrator. The arbitrator could consider that evidence in assessing the weight to be given Dr. Schottinger's testimony. Further, the arbitrator

could consider the letter in terms of Dr. Nudelman's review of the medical care provided by plaintiff to the patients in question.

2. Evidence of Altered Records

Plaintiff claims he presented evidence defendant had altered and otherwise tampered with evidence introduced at the arbitration hearing. The arbitrator impliedly rejected that assertion. Plaintiff argues, "[T]he [a]rbitrator's [f]indings failed to acknowledge the evidence of tampering." Plaintiff cites no legal authority for the proposition the arbitrator was required to make an express finding as to the evidence tampering claims. Pursuant to the bylaws, "Within thirty (30) days of completion of the hearing, the arbitrator shall make a report and recommendation in writing to the Executive Committee and to the Hospital Administrator, including findings of fact and a conclusion articulating the connection between the evidence produced at the hearing and the decision reached . . . ."

F. The Appellate Review Panel Hearing

1. By-law requirements

With respect to appellate review, defendant's medical staff bylaws provide: "1. If appellate review is timely requested by the appellant or the Executive Committee, *the Chairman of the Board of Directors shall appoint a three member Appellate Review Panel*, at least one of whom shall be a member of the Professional Staff of the Hospital who was not a witness at the prior hearing. The Chairperson of the Panel shall be selected by the Chairman of the Board of Directors. [¶] 2. *The appellate hearing* shall take place at a time and place agreed to by the Chairperson of the Appellate Review Panel and the appellant, preferably within sixty (60) days of receipt of the request for hearing, and *shall be based*

upon the prior hearing. No additional witnesses or evidence shall be presented unless the panel is convinced that the witnesses or evidence could not have been presented at the prior hearing. Each party shall have the right to appear and respond, may be represented by legal counsel and may present a written statement or brief and an oral presentation to the Appellate Review Panel. If the panel allows witnesses to appear before it, they may testify and be cross examined. The chairperson of the panel shall determine admissibility of evidence and appropriate procedures for examination of witnesses before the panel. [¶] 3. A verbatim record shall be ma[d]e of the appellate hearing. If either side chooses to engage a shorthand reporter, it shall bear the cost thereof. However, it shall make available to the other side, if requested, a copy of the transcript of the hearing at the cost of copying such transcript. [¶] 4. *Reasons for appeal and for reversal of the recommendations shall be procedural failure so as to deny a fair hearing, lack of a rational basis for the recommendations, or action taken arbitrarily or capriciously.* The panel may affirm, modify or reverse the recommendation. The panel also may remand the matter for further consideration of designated issues. In such instance the recommendations as to the designated may be reviewed by the Appellate Review Panel, in accordance with the procedures of this subsection, but following an expedited time frame, if feasible. [¶] 5. Upon receiving the written report of the Appellate Review Panel, which shall be due within thirty (30) days of completion of the hearing, the Chairman of the Board shall announce the Appellate Review Panel's decision in the matter as determined by majority vote. Such decision shall be transmitted to the Hospital Administrator, Chief of Staff, the Executive Committee, and to the appellant. Except in case of a remand, there shall be no further appeal to the Board of Directors or to the Professional Staff." (Italics added.)

2. Bias

Plaintiff asserts a violation of his fair procedure rights in that he was not given a sufficient opportunity to voir dire the members of the Appellate Review Panel to discover possible bias or conflicts of interest. The record does not support plaintiff's assertion.

At the outset of the appellate review hearing, plaintiff, who was no longer represented by counsel, stated, ". . . I had thought this was going to be a repeat of the arbitration . . . ." The chairperson of the Appellate Review Panel, Dr. Mary E. Reres, explained to plaintiff, "This is not a repeat of what you experienced during the arbitration hearing," and that review was limited to the three areas identified in the bylaws. Plaintiff then raised a second concern, as to the make-up of the Appellate Review Panel. Plaintiff stated, "And I do have further issues, and as I pointed out [previously,] thinking that this was going to be an arbitration hearing, that the people on the board . . . would be chosen in concert by the fact that all three have ties, and probably strong ties, can be an issue, and those ties being with Kaiser, and I would have hoped to have had a say in the choosing." Further, plaintiff stated, "[I]t would have been my preference to have had a panel that was non-Kaiser, non-Kaiser affiliated, and appointed in concert by the hospital and by myself." Plaintiff wanted to know what the panelists' "feeling[s]" were on that point. Plaintiff sought to ask the panelists, "[S]hould Dr. Jaffe have had a say in the choosing of the panelists, and should they have been from non-Kaiser surroundings." The chairperson, Dr. Reres, responded, "The panel cannot act in opposition to the bylaws, period." Later, Dr. Reres stated, "[The panel] cannot have an opinion different than the bylaws in the organization of this meeting." Nevertheless, Dr. Reres allowed the panel members to respond to plaintiff's questions.

The foregoing exchange demonstrates plaintiff's attempt to voir dire the members of the Appellate Review Panel concerning possible bias was limited to two specific questions. The questions related to the Appellate Review Panel's composition. Moreover, the panel members answered those questions. Plaintiff made no attempt to ask further questions. On this record, plaintiff's assertion his fair procedure rights were violated in that he was not given a sufficient opportunity to voir dire the members of the Appellate Review Panel to discover possible bias or conflicts of interest is without merit. Finally, we note there is no evidence of any bias on the part of the Appellate Review Panel members.

3. Medical records

Plaintiff contends the Appellate Review Panel could not have properly reviewed the record of the formal hearing because it admitted it did not review "*any*" medical records. Plaintiff argues: "[Plaintiff's] contention [in the trial court] was not that [the Appellate Review Panel] should have reviewed 'all' medical records, but that the [panel] admitted it was not provided with, nor had it reviewed 'any' of the medical records. [Citation.] Therefore, the issues [plaintiff] raised before the [Appellate Review Panel], including [defendant's] tampering with and misreporting of the medical records, and the Arbitrator's disregarding of the evidence regarding the medical records could not have been reviewed by the [panel] because the [panel] did not have 'any' medical records to decide these issues. [¶] . . . [¶] Furthermore, it was improper for the [Appellate Review Panel's] Findings to state conclusions regarding the medical records without reviewing any medical records."

The record does not support plaintiff's claim. At the outset of the Appellate Review Panel hearing, while plaintiff was attempting to clarify the scope of the hearing, the

following transpired: "Dr. Robert Jaffe: And were all 32 volumes of the transcripts read by the panelists? Is that what I understand? [¶] Dr. Reres: Yes. [¶] Dr. Robert Jaffe: And were all the exhibits all read? [¶] Dr. Reres: The exhibits were read. [¶] Dr. Robert Jaffe: Medical Records all studied? [¶] Dr. Reres: No, medical records were not presented, only the materials that were available during the arbitration process. [¶] [Legal Advisor to the Panel]: The medical records are available, and should there be any reason to go back and look at them, the panel will do that. They are available. [¶] Dr. Robert Jaffe: Thank you." The foregoing was not a concession by the Appellate Review Panel that it had not reviewed *any* medical records. Dr. Reres simply stated the panel had reviewed the record of proceedings before the arbitrator, including exhibits. In other words, the Appellate Review Panel in reaching its decision considered the entire record of the arbitration hearing.

4. Findings

Plaintiff contends the Appellate Review Panel failed "'to articulate a connection between the evidence produced at the hearing and the decision reached,'" and "to reveal the analytic route . . . traveled from evidence to action" in violation of section 809.4, subdivision (a)(1). Section 809.4, subdivision (a) provides: "Upon the completion of a hearing concerning a final proposed action for which a report is required to be filed under Section 805, the licentiate and the peer review body involved have the right to receive all of the following: [¶] (1) A written decision of the trier of fact, including findings of fact and a conclusion articulating the connection between the evidence produced at the hearing and the decision reached. [¶] (2) A written explanation of the procedure for appealing the decision, if any appellate mechanism exists." The written decision referred to in section 809.4, subdivision (a)(1) is that of the trier of fact—in this case, the arbitrator who presided over the formal hearing.

In other words, section 809.4, subdivision (a), required the arbitrator, not the Appellate Review Panel, to issue a written decision identifying the connection between the evidence produced at the hearing and the ultimate decision. This is consistent with the Supreme Court's decision in *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515, which the trial court cited. Plaintiff does not contend the arbitrator's findings were deficient.

5. Medical Board of California

Plaintiff introduced new evidence before the Appellate Review Panel. Plaintiff presented evidence that, on March 19, 1998, the Medical Board of California notified him it had closed its investigation—prompted by defendant's section 805 report—and stated "[W]e have found no deviation from the Standard of Care in the Community as related to the information that has been reviewed." The Appellate Review Panel considered that letter and related argument in reaching its decision. While plaintiff's argument is not entirely clear, he apparently contends the Appellate Review Panel misconstrued, disregarded, or gave insufficient weight to the medical board's findings. The medical board's decision was not binding on defendant. (See *Bonner v. Sisters of Providence Corp., supra,* 194 Cal.App.3d at pp. 444-447.) Under the bylaws, the weight to be accorded the medical board's decision was a question for the Appellate Review Panel. Also pursuant to the bylaws, the Appellate Review Panel could reverse the recommended administrative action for: denial of a procedurally fair hearing; lack of a rational basis for the recommendation; or arbitrary or capricious action taken. Plaintiff has not argued nor shown that the medical board's decision compelled a reversal of the recommended administrative action.

G. The Syringe Reuse Charge

Defendant's Executive Committee charged in part that plaintiff had maintained an inappropriate practice of using the same syringe for injecting different patients. As noted above, the arbitrator found plaintiff had, on at least one occasion, used a single syringe to inject multiple patients, a practice not only below the community standard of care, but "intolerable" and exhibiting "an astonishing lack of judgment." Plaintiff concedes there was an initial incident when he used the same syringe (with a new needle each time) on multiple patients. He argues, however, that there was no substantial evidence he repeated that practice. Moreover, plaintiff contends the arbitrator's finding of at least one occasion improperly varied from the charge that he maintained a practice of misconduct, thereby circumventing defendant's burden of proof as to the charge. In other words, plaintiff asserts the termination of his staff membership and hospital privileges was upheld for reasons other than those set forth in the statement of charges. Plaintiff cites no legal authority for the proposition the arbitrator's finding could not vary in any degree whatsoever from the specific misconduct charged. Moreover, the arbitrator did not consider evidence of uncharged misconduct and limited his findings to issues raised by the statement of charges. Under these circumstances, we find no improper prejudicial variance between the acts charged and the arbitrator's findings. (*Cook v. Civil Service Commission* (1960) 178 Cal.App.2d 118, 133.)

IV. DISPOSITION

The judgment is affirmed. The order denying the motion to vacate the judgment is affirmed. Defendants, Kaiser Foundation Hospital—Panorama City, Southern California

Permanente Medical Group, and Kaiser Health Plan, Inc., are to recover their costs on appeal from plaintiff, Robert Jaffe, M.D.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

GRIGNON, J. ARMSTRONG, J.

A-20

IN THE COURT OF APPEAL OF THE STATE OF

CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 5

December 21, 2004

Robert J. Jaffe M.D.
22141 Burbank Blvd.
Suite 5
Woodland Hills, CA 91367

Robert J. Jaffe, M.D.
v.
Kaiser Foundation Hospital, et al.

B166698
Los Angeles County No. BS069856

THE COURT:

Petition for hearing is denied.

cc: All Counsel
File

2nd Civil No. B166698

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ROBERT J. JAFFE, M.D.
Appellant,

vs.

KAISER FOUNDATION HOSPITAL, SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP,
And Does 1-100, inclusive,
Respondents.

SUPPLEMENTAL REQUEST FOR THE COURT TO TAKE JUDICIAL NOTICE

ROBERT J. JAFFE, M.D.
22141 Burbank Blvd., Suite 5
Woodland Hills
California 91367
(818) 713-1378
Appellant in Pro Per

2nd Civil No. B166698

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ROBERT J. JAFFE, M.D.
Appellant,
vs.

KAISER FOUNDATION HOSPITAL, SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP,
And Does 1-100, inclusive,
Respondents.

SUPPLEMENTAL REQUEST FOR THE COURT TO TAKE JUDICIAL NOTICE

Pursuant to Evidence Code section 459, Appellant in pro per, ROBERT J. JAFFE, M.D., requests that the Court take Judicial Notice of new decisional case law, unavailable to be cited at the time briefs were first submitted: Yaqub v. Salinas Valley Memorial Healthcare System (2004) Cal.App.4th. This case speaks on subject matter at issue in this appeal and upon which this appeal is based. The subject matter that this case speaks upon is already thoroughly addressed in Appellant's briefs both before the lower court and this court.

This new case law of which Appellant requests that the court take judicial notice, is of substantial consequence to the determination of this action:

REQUEST FOR JUDICIAL NOTICE

1. Yaqub v. Salinas Valley Memorial Healthcare System (2004) Cal.App.4th states: "a direct, personal, and substantial pecuniary interest does indeed exist when income from judging depends upon the volume of cases an adjudicator hears and when frequent litigants are free to choose among adjudicators, preferring those who render favorable decisions." (*Id.* at pp. 1031-1032.) We believe that the circumstances presented in this case fall within the ambit of *Haas*. Pursuant to Appendix Section II(G) of the hospital bylaws, the MEC unilaterally appointed Justice Agliano as hearing officer, and his fee was paid by the hospital."

2. Yaqub v. Salinas Valley Memorial Healthcare System (2004) Cal.App.4th states: "We also acknowledge that there was no evidence of actual prejudice or of a direct financial interest in the outcome of the case. As both the ARP and the trial court observed, "the administrative record shows that the present hearing was conducted fairly and even-handedly by the presiding officer." The court further noted that in a previous {Slip Opn. Page 13} proceeding conducted by Justice Agliano the Hearing Panel had ruled in favor of the physician. Nevertheless, the Supreme Court emphasized in *Haas* that "the risk of bias caused by financial interest need not manifest itself in overtly prejudiced, automatic rulings in favor of the party who selects and pays the adjudicator." (*Haas, supra,* 27 Cal.4th at p. 1030.) " 'The Court's inquiry . . . is not whether a particular man has succumbed to temptation, but whether the economic realities make the design of the fee system vulnerable to a "possible temptation" to the "average man" as judge.' " (*Id.* at p. 1029.)"

3. Yaqub v. Salinas Valley Memorial Healthcare System (2004) Cal.App.4th states: "Code of Civil Procedure section 170.1, subdivision (a)(3), states that a judge must be disqualified if he or she "has a financial interest in the subject matter in a proceeding or in a party to the proceeding." And Canon 2 of the Code of Judicial Ethics states that a judge "shall avoid impropriety and the *appearance* of impropriety in all of the judge's activities." (Italics added.) The commentary to this canon provides an objective test for the appearance of impropriety: The question is not whether the judge is actually biased, but "whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence." (See, e.g., *Hall v. Harker* (1999) 69 Cal.App.4th 836, 841, disapproved on another ground in *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336.) Measured by these standards and underlying principles, SVMHS's procedures for appointing hearing officers were not consistent with the appearance of impartiality. Appellant's objection on this ground was sound, and his petition for a writ of mandate should therefore have been granted. {Slip Opn. Page 14}."

4. Yaqub v. Salinas Valley Memorial Healthcare System (2004) Cal.App.4th states: "We do caution, however, that if an appellate review hearing does take place without counsel for either side, it would strain the bounds of due process to allow the hospital's attorney, who took an active role in assisting the MEC to bring charges against appellant, to serve as advisor to the board in the hearing. (See *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 94 [city attorney's assistance and advice to hearing officer at administrative review hearing constituted an impermissible "overlapping of advocacy and decisionmaking roles" in violation of due process, as attorney had taken an active and significant role as advocate for the city in prior proceedings]; see also *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, 814-816 [city attorney's

interactions with board on other occasions suggested probable influence and appearance of unfairness].)"

5. Yaqub v. Salinas Valley Memorial Healthcare System (2004) Cal.App.4th states: "The rule against overlapping functions . . . applies to prevent participation at ascending levels of the process, so that a participant will not be in the position of reviewing his own decision or judging a man whom he has either charged or investigated." (*Rhee v. El Camino Hospital Dist.* (1988) 201 Cal.App.3d 477, 499.)"

6. Apropos of the above, Appellant further requests that the court take judicial notice of an easily verifiable fact, pursuant to 452(h), that the Arbitrator who heard this matter, Daniel H. Willick, frequently serves as hearing officer, arbitrator and general counsel to hospitals. This fact is verifiable by his curriculum vitae at the time at issue in 1995, and more thoroughly verifiable by his curriculum vitae currently posted on the Internet, www.Nossaman.com, (click on healthcare, then click on Daniel H. Willick). The two curricula vitae are nearly identical.

7. Yaqub v. Salinas Valley Memorial Healthcare System (2004) Cal.App.4th states: "Whether the hospital's determination was made according to a fair procedure is a question of law, which we consider independently based on the administrative record." (*Pomona Valley Hospital Medical Center v. Superior Court* (1997) 55 Cal.App.4th 93, 101.)"

DATED: October 8, 2004

/s/ Robert J. Jaffe, M.D.
ROBERT J. JAFFE, M.D.
Appellant in Pro Per

MEMORANDUM OF POINTS & AUTHORITIES

1. Because Yaqub v. Salinas Valley Memorial Healthcare System (2004) Cal.App.4th Is New Case Law it Therefore Could Not Have Been Included in Appellant's Reply Brief Before This Court.

Yaqub v. Salinas Valley Memorial Healthcare System (2004) Cal.App.4th became decisional law on September 16, 2004, and was published on Friday, September 17, 2004, six months after Appellant's Opening Brief was due and only three days before Appellant's Reply Brief was due on Monday, September 20, 2004. Appellant did not become aware of this new case law until approximately two weeks after it was published. It was impossible to include this case law in Appellant's Opening Brief and all but impossible to include same in Appellant's Reply Brief. However, as shown in Appellant's Declaration attached hereto, the case law quotations from Yaqub, supra, cited in this request for judicial notice herein speaks on subject matter that is already thoroughly addressed in Appellant's briefs both before the lower court and this court.

2. Appellant Requests that the Court Take Judicial Notice Under Evidence Code Section 459, Pursuant to Appellate Court Rule 5.

Appellate Court Rule 5 states that Requests for Judicial Notice under Evidence Code section 459 shall be submitted in a separate motion, served on all parties, and accompanied by a proposed order.

Appellate Court Rule 5 states as follows:

"Rule 5. Requests for Judicial Notice Requests that the Court take judicial notice under Evidence Code section 459 shall be submitted in a separate motion, served on all parties, and

accompanied by a proposed order. These requests shall not be made in the body of a brief or included as an attachment to a brief."

In compliance with Appellate Court Rule 5, Appellant has submitted this Supplemental Request for Judicial Notice in a separate motion, served it on all parties and has attached a proposed order with this motion.

3. Evidence Code Section 451 States that Judicial Notice Shall be Taken of Decisional Law.

Evidence Code section 451:

"451. Judicial notice *shall* be taken of the following:
(a) The *decisional, constitutional, and public statutory law of this state* and of the United States and the provisions of any charter described in Section 3, 4, or 5 of Article XI of the California Constitution..." (Emphasis added.)

Since Yaqub, supra is case decisional law, it is therefore proper subject matter for Judicial Notice pursuant to Evidence Code 451.

4. Evidence Code section 452 states that Judicial Notice May be Taken of Facts That are Not Reasonably Subject to Dispute and Are Capable of Immediate And Accurate Determination By Resort To Sources Of Reasonably Indisputable Accuracy.

Evidence Code section 452:

"452. Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:
...(h) *Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate*

determination by resort to sources of reasonably indisputable accuracy." (Emphasis added.)

Since the fact that the Arbitrator in this matter, Daniel H. Willick, "frequently" acts as hearing officer, arbitrator and general counsel to hospitals is a relevant issue in this matter, and is easily verifiable by his curriculum vitae at the time at issue in 1995, and is also verifiable by his curriculum vitae currently posted on the Internet, www.Nossaman.com, (click on healthcare, then click on Daniel H. Willick), this fact is therefore proper subject matter for judicial notice pursuant to Evidence Code section 452(h).

5. Evidence Code Section 453 States that the Trial Court Shall Take Judicial Notice of Any Matter Specified in 452, if a Party Requests it, Gives Each Adverse Party Sufficient Notice Of The Request, And Furnishes The Court With Sufficient Information To Enable It To Take Judicial Notice Of The Matter.

Evidence Code section 453:

"The trial court shall take judicial notice of any matter specified in Section 452 if a party requests it and:
(a) Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and
(b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter."

Evidence Code section 451 mandates that judicial notice be taken of case decisional law. Because Yaqub, supra is new case decisional law, Appellant's request that judicial notice be taken of it, should not be barred because it was not published in time for it to be cited in Appellant's briefs. As shown in Appellant's declaration attached hereto, the subject matter that Yaqub, supra, speaks upon, as quoted

in this Request for Judicial Notice, is fully cited in Appellant's Briefs both before the lower court and this court.

Evidence Code section 453 states that judicial notice shall be taken of case law, if the adverse party is given sufficient notice of the request for judicial notice to enable such adverse party to prepare and meet the request.

Accordingly, if the Court believes that November 1, 2004, the date that the hearing in this matter is scheduled, is not sufficient time for the adverse party to respond to this new case law, then Appellant would have no objection to the Court rescheduling the hearing in this matter until such time as the court deems as adequate time for the adverse party to respond.

In the alternative, the court may wish to grant both parties the opportunity to argue the relevance of this new case law in a supplemental brief, with a word limit and extension of time as the court so deems.

DATED: Respectfully Submitted,

/s/ Robert J. Jaffe, M.D.
ROBERT J. JAFFE, M.D.,
Appellant in Pro Per

DECLARATION OF ROBERT J. JAFFE, M.D.

I, Robert J. Jaffe, M.D., declare as follows:

1. I am the Appellant in Pro Per in this appeal.

2. The purpose for filing this Supplemental Request for Judicial Notice is for the court to take judicial notice of new case law, Yaqub v. Salinas Valley Memorial Healthcare System (2004) Cal.App.4th.

3. Yaqub v. Salinas Valley Memorial Healthcare System (2004) Cal.App.4th became decisional law on September 16, 2004, and was published Friday, September 17, 2004, three days before my Reply Brief was due on Monday, September 20, 2004.

4. I did not become aware of this new case law until approximately two weeks after my Reply Brief was filed.

5. Each aspect of this new case law about which I have requested that the Court take judicial notice is at issue in my appeal, and upon which my appeal in part is based.

6. Each aspect of this new case law about which I have requested the Court take Judicial Notice, speaks on subject matter already addressed in my briefs:

(1) Judicial Notice item 1 is a quotation from Yaqub, supra, that speaks on subject matter thoroughly addressed in Petitioner's Opening Brief before the lower Court, p. 34, lines 9-14; Appellant's Opening Brief, p. 24:L.16-21; and Appellant's Reply Brief, P. 19, lines 3-10;

(2) Judicial Notice item 2 is a quotation from Yaqub, supra, that speaks on subject matter thoroughly addressed in Petitioner's Opening Brief before the lower Court,

p. 34, lines 9-14; Appellant's Opening Brief, p. 24:L.16-21; and Appellant's Reply Brief, P. 19, lines 3-10;

(3) Judicial Notice item 3 is a quotation from Yaqub, supra, that speaks on subject matter thoroughly addressed in Petitioner's Opening Brief before the lower Court, p. 34, lines 9-14; Appellant's Opening Brief, p. 24:L.16-21; and Appellant's Reply Brief, P. 19, lines 3-10;

(4) Judicial Notice item 4 is a quotation from Yaqub, supra, that speaks on subject matter thoroughly addressed in Petitioner's Opening Brief before the lower Court, p. 5-6; Appellant's Opening Brief, p. 28 and Appellant's Reply Brief, P. 28-29;

(5) Judicial Notice item 5 is a quotation from Yaqub, supra, that speaks on subject matter thoroughly addressed in Petitioner's Opening Brief before the lower Court, p. 4-5; Appellant's Opening Brief, p. 18-19; and Appellant's Reply Brief, P. 16-18;

(6) Judicial Notice item 6 is a quotation from Yaqub, supra, that speaks on an matter thoroughly addressed in Appellant's Reply Brief, p. 19 and Resp.1910.

(7) Judicial Notice item 7 is a quotation from Yaqub, supra, that speaks on an matter thoroughly addressed in Appellant's Opening Brief, page, 5 Appellant's Reply Brief, p. 2.

7. Each matter stated herein on which I request that the court take judicial notice is of substantial consequence to the determination of my case on appeal.

8. The matters on which I request that the court take judicial notice herein are proper matters for judicial notice pursuant to Evidence Code sections 451(a) and 455(h).

I declare under the penalty of perjury that the foregoing is true and correct.

DATED: October 8, 2004

/s/ Robert J. Jaffe, M.D.
ROBERT J. JAFFE, M.D.
Appellant in Pro Per

ORDER

IT IS SO ORDERED THAT APPELLANT'S SUPPLEMENTAL REQUEST FOR THE COURT TO TAKE JUDICIAL NOTICE IS GRANTED.

DATED: _____

PRESIDING JUSTICE

DECLARATION OF SERVICE BY MAIL

I, the undersigned, hereby declare under penalty of perjury, that the following is true and correct:

I am over eighteen years of age, and not a party to the within cause. I am a resident of the County of Los Angeles, State of California. My business address is 22141 Burbank Blvd., #5 Woodland Hills, California 91367.

I served the foregoing SUPPLEMANTAL REQUEST FOR THE COURT TO TAKE JUDICIAL NOTICE on all the interested parties named below by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail in the city of Los Angeles, California, addressed to the offices or residences as follows:

Foley & Lardner
2029 Century Park East, Suite 3500
Los Angeles, CA 90067-3021
Attn: Sarah G. Benator, Esq.
Lowell C. Brown, Esq.

[Respondents, KAISER FOUNDATION HOSPITAL, SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP; KAISER HEALTH PLAN, INC.]

Executed on October 11, 2004, at Los Angeles, California

/s/ Robin DeMichael.
Robin DeMichael

Oct-05-1994 Wednesday 11:05 ID: Daniel H. Willick Fax No. 310-286-04887 #804 PO2

DANIEL H. WILLICK
Attorney at Law
1999 Avenue of the Stars
Twenty-Seventh Floor
Los Angeles, CA

Telephone: 310) 286-0485
Facsimile: (310) 286-0487

Legal Experience:

Daniel H. Willick has practiced law since 1973, with an emphasis on healthcare law and complex civil litigation, including financial institutions law, securities law and bankruptcy. In addition to his active litigation practice, Dan acts as general counsel to the Medical Staff at Queen of Angels-Hollywood Presbyterian Medical Center, the California Psychiatric Association, the Southern California Psychiatric Society, the Southern California Psychoanalytic Institute, the Los Angeles Psychoanalytic Society and Institute and the Chief of Staff at Cedars-Sinai Medical Center, Los Angeles. He has extensive experience concerning healthcare issues.

Dan has expertise in handling medical staff corrective action hearings. He has prepared medical staff bylaw provisions governing such hearings, frequently acted as a hearing officer, represented medical staffs and professional societies at such hearings, and successfully defend court challenges to such hearings.

Dan has successfully represented and advised medical staffs in disputes over medical staff self-governance, including representing the Medical Staff of Eisenhower

Memorial Hospital in the Eisenhower Memorial Hospital v. Stoltzman, et al. lawsuit (California Court of Appeals for the Fourth Appellate District, Case No. 4th Civil No. E006571), and representing the Medical Staff of Queen of Angeles-Hollywood Presbyterian Medical Center in successfully resisting efforts by the hospital administration to usurp the medical staff's authority to control quality assurance. He represented the California Psychiatric Association in the post-appeal proceedings implementing the California Supreme Court's decision on medical staff privileges in California Association of Psychology Providers v. Rank (1990) 51 Cal.3d 1.

Appellate courts, including the California Supreme Court, have adopted positions Dan has taken in amicus curiae briefs on the confidentiality of medical records in Mendendez v. Superior Court, (1992) 3 Cal.4th 435 and Scull v. Superior Court, (1988) 206 Cal.App.3d 784.

DANIEL H. WILLICK

Other Legal Experience:

Representing of healthcare providers in a Federal Trade Commission investigation;

Successful insurance coverage litigation on behalf of a financial institution against directors' and officers' liability insurance carriers;

Real estate litigation in test cases successfully defending the right of federally-chartered savings and loan association to enforce due-on-sale clause;

Successful defense challenges under the Community Reinvestment Act to mergers of financial institutions;

Securities litigation, including defense of Class Securities Litigation, including defense of class actions, and shareholder derivative suits against a multi-billion dollar financial institution;

Representative of parties in litigation and administrative proceedings concerning hostile takeovers of financial institutions;

Representation of a bankruptcy trustee as special counsel prosecuting over 170 cases to obtain additional capital contributions from investors in a failed securities broker dealer;

Representation of multiple creditors in three separate bankruptcy proceedings, each involving the liquidation of a government securities broker dealer;

Litigation concerning the rehabilitation and liquidation of a major mortgage guaranty insurer;

Successful defense of lawsuit brought by the Federal Deposit Insurance Corporation seeking rescission of merger of several banks in Florida;

Tax refund litigation; and

Representation of attorneys in law firm dissolutions and representation of physician in medical practice dissolution.

Admitted to Practice of Law:

California, 1973
United States District Court, Central District of California, 1973
Ninth Circuit Court of Appeals, 1975
United States District Court, Eastern District of California, 1979
United States District Court, Northern District of California, 1982
United States Supreme Court, 1982
District of Columbia, 1982
United States District Court, Southern District of California, 1986

Education:

Dan has an extensive and varied academic background. He was a Russell Sage Foundation Fellow in Law and Social Science and attended the U.C.L.A. School of Law, where he was initiated into the order of Coif, and was awarded a J.D. in 1973. Among other honors, Dan received a National First Prize in the Association of Trial Lawyers of America Environmental Law Essay Contest, is a member of Phi Beta Kappa and was selected as a Woodrow Wilson Fellow. He also holds a Ph.D. from the University of Chicago and has worked extensively in both the academic and legal fields, having taught at the University of California at Los Angeles, the University of California at Santa Barbara, California State University, Los Angeles and Loyola Law School. Dan presently holds an appointment as a Lecturer at the U.C.L.A. School of Medicine. He has published articles on a wide variety of legal and other topics.

U.C.L.A. School of Law J.D. (top 10% of class) 1973

University of Chicago 1968	Ph.D. (Sociology)
University of Chicago 1966	A.M. (Sociology)
U.C.L.A. 1964	A.B. (highest honors)

Academic Honors:

Order of the Coif
Phi Beta Kappa
National First Prize – Association of Trial Lawyers of America Environmental Law Essay Contest, 1973
Russell Sage Foundation Resident in Law and Social Science, 1970-1972
National Defense Education Act Fellow, 1965-1967
Woodrow Wilson Fellow, 1964-1965
Research grants from the University of California Academic Senate, 1967-1973
Offered Ford Foundation Faculty Fellowship for 1970-1971
President, U.C.L.A. Chapter of Pi Sigma Alpha

Publications:

"Contracts To Provide Psychiatric Services Through Health Care Organizations", 7 California Psychiatric Association Newsletter 4 (March, 1993);
"Attacks on Medical Staff Self-Governance Intensify", 37 Southern California Psychiatrist 3 (April, 1989);
"Social Class as a Factor Affecting the Judicial Disposition...", Criminology (1975);
"Rule Enforcement by the Los Angeles Air Pollution control District, 3
Ecology Law Quarterly 507 (1973)

"Survey question order . . .", 35 Public Opinion Quarterly 189 (1971)

"Foreign Affairs and Party Choice", 75 American Journal of Sociology 530 (1970)

Other publications not listed.

Law-Related Community Service:

Member, Board of Directors (1981-Present) and Vice-President (1983-1989) of Constitutional Rights Foundation
Member, Board of Directors (1990-1993) of Harvard Water Polo Foundation
Pro bono representation of parents in Los Angeles public school desegregation case, 1977-1978
Member, Los Angeles County Bar Association Delegation to the State Bar Convention, 1975, 1976 and 1977

Employment History:
Law:

Law Offices of Daniel H. Willick, Los Ageles, June 1993 to present, also Of Counsel to Pircher, Nichols & Meeks
Partner, Varet Marcus & Fink (formerly Milgrim, Thomajan & Lee) Los Angeles, October, 1990-May, 1993
Of Counsel, McKenna & Fitting, Los Angeles, September-October, 1990
Associate, McKenna & Fitting, Los Angeles, 1978-1980
Associate, Greenberg, Bernard, Weiss & Karma; Ellis J. Horvitz, Los Angeles, 1975-1968
Summer Associate and Associate, Kadison, Pfaelzer, Woodard, Quinn & Rossi, Los Angeles, Summer 1972, 1973-1975

Academic Appointments

Lecturer, Department of Psychiatry, U.C.L.A. School of Medicine, 1993 to present

Adjunct Professor of Law (part-time) Loyola Law School, Los Angeles, 1977-1978
Lecturer in Sociology (part-time) U.C.L.A., 1975-1977
Assistant Professor of Sociology (part-time), California State University at Los Angeles, 1970-1971
Assistant Professor of Sociology, University of California at Santa Barbara, 1967-1973

References available upon request.

PEOPLE

Daniel H. Willick - Partner
dwillick@nossaman.com
445 South Figueroa Street, 31st Floor
Los Angeles, CA 90071-1602
Phone (213) 612-7814
Fax (213) 612-7801
» Print This Page

Practice Areas:
Healthcare
Employment
Fraud & Abuse
Healthcare Professional Licensing and Peer Review
HIPAA
Hospitals and Health Facilities
Managed Care
Medical Research
Peer Review
Professional Societies and Associations
Litigation
Complex Civil Litigation

Professional Profile:

Dan has practiced law since 1973, with an emphasis on healthcare law and complex civil litigation. He has been involved in precedent-setting lawsuits concerning important healthcare issues. As general counsel to a number of healthcare organizations, Dan regularly advises boards of directors, negotiates contracts with employees and lobbyists, and follows and advises on proposed healthcare legislation and regulations. He serves as legal counsel to a political action committee as well as to educational programs for students receiving psychoanalytic training. Additionally, Dan

advises on the operation of clinics providing psychotherapy and other medical services.

Dan's expansive healthcare practice includes representing physicians and other healthcare providers before licensing boards and in medical staff corrective action hearings. He frequently acts as a hearing officer or arbitrator in medical staff hearings. Dan has prepared medical staff bylaw provisions governing peer review hearings and has represented medical staffs and professional societies at such hearings.

He is a Clinical Assistant Professor at the Keck School of Medicine at the University of Southern California and has also held academic appointments at Loyola Law School, UCLA, University of California at Santa Barbara and California State University at Los Angeles.

Representative Work:

Menendez v. Superior Court (1992) 3 Cal. 4th 435 -The California Supreme Court adopted positions on confidentiality and privilege put forward in an amicus curiae brief on behalf of the California Psychiatric Association.

California Association of Psychology Providers v. Rank (1990) 51 Cal.3d 1 - Represented the California Psychiatric Association in proceedings to implement the California Supreme Court's opinion concerning medical staff issues.

Ford v. Norton (2001) 89 Cal. App. 4th 974 - The Court of Appeal adopted positions propounded in an amicus curiae brief regarding immunity from malpractice claims for early release of patient from an involuntary hold.

In re Family Health Services, Inc. (9th Cir. B.A.P. 1991) 130 B.R. 314 - Represented an HMO that successfully reorganized in a bankruptcy proceeding.
Eisenhower Memorial Hospital v. Stoltzman, et al. (California Court of Appeal for the Fourth Appellate District, Case No. 4th Civil No. E006571) - Successfully handled dispute over medical staff self-governance.

Great American Bank. Represented this multi-billion dollar bank in the defense of class actions and shareholder derivative suits. Successful litigation on behalf of the bank to obtain directors' and officers' liability insurance coverage.

In re: Comark. Successful prosecution of involuntary Chapter 7 bankruptcy of failed government securities broker dealer.

Serves as General Counsel to California Psychiatric Association, Southern California Psychiatric Society, Orange County Psychiatric Society and advises other non-profit medical professional societies and associations.

Presentations and Publications:

"The Perfect Storm-Multiple Problems When A Physician Is Accused of Deficient Care," Health Lawyers Weekly, April 30, 2004.
"Liability of the Forensic Psychiatrist," co-author of a chapter in R. Rosner, M.D. (ed.), Principles and Practice of Forensic Psychiatry, Oxford University Press, 2002.
"Confidentiality of Psychotherapy and the Possible Release of Information to Family Members," 11 The Journal of NAMI California 78, September, 2000.
"Contracts To Provide Psychiatric Services Through Health Care Organizations," 7 California Psychiatric Association Newsletter 4, March, 1993.

"Attacks On Medical Staff Self-Governance Intensify," 37 Southern California Psychiatrist 3, April 1989.
"Social Class as a Factor Affecting the Judicial Disposition...," Criminology, 1975.
"Rule Enforcement by the Los Angeles Air Pollution Control District," 2 Ecology Law Quarterly 507, 1973.
Presenter, "Common Risks Of Malpractice, Peer Review and Licensing Board Claims In The Practice Of Medicine" UCLA Psychiatry Residents (February 2004)
Professional Affiliations:
USC Medical School, UCLA Medical School and California Psychiatric Association, frequent volunteer lecturer, 1990 – present.
Santa Barbara County Air Pollution Control District Hearing Board, Former Member, 1999-2000 and Vice Chairperson, 2000-2002.
Federal Bar Association Delegation to the State Bar Convention, Member, 1995.
Constitutional Rights Foundation, Former Director, 1981-1994, and Vice-President, 1983-1989.
Los Angeles County Bar Association Delegation to the State Bar Convention, Member, 1975-1977.

Education:
J.D., University of California, Los Angeles, 1973
Ph.D., University of Chicago, 1968
A.M., University of Chicago, 1966
A.B., University of California, Los Angeles, 1964

Honors and Awards:

Recipient of the California Psychiatric Association's Edwin Rudin, M.D., Award for Excellence in Government Relations, 2000
Order of the Coif, UCLA School of Law, 1973
National First Prize (co-recipient) Association of Trial Lawyers of America environmental Law Essay Contest, 1973

Russell Sage Foundation Resident in Law and Social Science, UCLA School of Law, 1970-1972
Phi Beta Kappa, UCLA, 1964

Admitted:

California
The United States Supreme Court
United States Ninth Circuit Court of Appeals
United States District Courts for the Southern, Central, Northern and Eastern Districts of California
District of Columbia (Inactive)

Copyright | Terms & Conditions

122 Cal.App. 4th 474

- Cal.Rptr.3d -

NIZAR YAQUB, Petitioner and Appellant,
v.
SALINAS VALLEY MEMORIAL HEALTHCARE SYSTEM, et. al., Defendants and Respondents.

H2064628
California Court of Appeal, Sixth District
September 16, 1004

(Superior Court of Monterey County, No. M61353, Robert O'Farrell, Judge.)
(Opinion by Elia, J., with Rushing, P. J., and Premo, J., concurring.)

COUNSEL

Spiegel, Liao & Kagay and Charles M. Kagay, for Appellant. Abramson, Church & Stave, Kelly McCarthy Sutherland and Hanson; Bridgett, Marcus, Vlahos & Rudy, Michael A. Duncheon and Jacquelyn J. Garman, for Respondents.

OPINION
ELIA, J.-

In this appeal Nizar Yaqub, M.D., seeks review of the superior court's denial of his petition for a writ of mandate and his motions for vacation of judgment and a new trial. He contends that the petition should have been granted because respondent, Salinas Valley Memorial HealthCare System (SVMHS), denied him a fair administrative hearing before revoking his hospital privileges at Salinas Valley Memorial Hospital (SVMH or the hospital). Appellant specifically

contends that the presiding officer at the hearing before the Fair Hearing Panel had a financial conflict of interest that should have disqualified him from conducting the hearing. He also contends that the presiding officer improperly denied him the opportunity to present testimony of the physicians who had signed the charging documents. Appellant further argues that the composition of both the Hearing Panel and the Appellate Review Panel (ARP) violated his right to due process and a fair procedure because the panels comprised the same people who had suspended his hospital privileges in a prior proceeding. The appellate review process, appellant contends, was also unfair because the ARP sought advice from an attorney who had advocated against him in the matter, and because it "revers[ed] an unappealed finding" of {Slip Opn. Page 2} the Hearing Panel and substituted its own factual findings. Finally, appellant contends that the Hearing Panel's determination that he failed to provide for the care of his patients is not supported by substantial evidence.

We agree with appellant that the hearing officer should not have presided over appellant's Fair Hearing. Accordingly, we will reverse the judgment. We reach additional issues only where necessary to guide the parties in any further proceedings in this matter.

Background

Appellant's privileges at SVMH were restricted in a previous proceeding before a review panel of the SVMHS board of directors. That matter culminated in a decision on July 13, 2001 in which the board suspended his surgical privileges except for Caesarean sections. The board ordered him to take courses on interpersonal relations within three months and refrain from performing procedures for which he was not credentialed. The board also ordered appellant to submit to the hospital's Medical Executive Committee (MEC) a plan naming the physicians who would care for his patients during his 90-day suspension. Appellant was informed that if he

violated any applicable bylaws, rules, or regulations, he would be summarily removed from the hospital staff. Appellant's petition for a writ of administrative mandamus was denied by the superior court, and this court upheld that ruling in an opinion filed January 15, 2004 (H024953).
On July 16, 2001, in accordance with the board's suspension order, appellant was instructed to submit his plan for his patients' care within three days. Appellant was told to coordinate the plan with Dr. David Perrott, a vice president and medical director at the hospital. Appellant requested a two-week extension to allow time for "an orderly transition of care for his patients during the period of the suspension." The hospital granted him a six-day extension for only non-elective obstetrical procedures. In the same letter, which was addressed to appellant's attorney, Arnold B. Myers, the hospital's attorney, noted that it was "Dr. Yaqub's responsibility to contact his patients and make {Slip Opn. Page 3} arrangements with them to provide for their care at Natividad, another hospital in the area, or with another practitioner. Dr. Yaqub should understand that this implementation schedule must be rigidly adhered to so he will be in compliance with the Board of Directors' Decision."

On July 24, 2001, appellant's attorney, Barry King, notified counsel for the hospital that despite a "desperate effort" appellant had been unable to find anyone to cover his practice. According to King, appellant had expected that Drs. Halfpenny and Ross would provide coverage, but they had just informed him that they were not able or willing to do so. fn. 1 None of the other physicians with staff privileges at the hospital were willing to take his patients. Appellant refused to "coerce or force" any of his patients to deliver their babies at a hospital they did not choose, even though he had privileges at Natividad Medical Center (Natividad), also in Salinas. Appellant requested that the hospital *require* the other OB-GYN physicians to cover his patients. Alternatively, he requested a further extension for a

"sufficient" period to enable him to find "the appropriate medical personnel" to care for his patients.

The hospital rejected both proposals. Myers responded the next day that Natividad was an accredited facility specializing in obstetrical care. Myers stated that appellant had a duty to inform his patients by July 25 that (1) he could deliver their babies at Natividad; (2) they could arrange for care by other obstetricians in the community; and (3) if they appeared at SVMH without an assigned physician, they would be cared for by the obstetrician on call.

Dr. Perrott incorporated this statement into a memorandum distributed to the obstetrical physicians at the hospital. The memo, prepared by Dr. Perrott in consultation {Slip Opn. Page 4} with appellant, briefly explained that appellant had the responsibility to inform his patients that (1) he had privileges at Natividad; (2) patients could arrange for care from other physicians in the community; and (3) if they went to SVMH without an assigned physician they would be cared for by the physician for unregistered obstetrical services. The memo specifically warned the staff that "there may be Dr. Yaqub patients presenting to SVMH for obstetrical care." fn. 2 Appellant regarded the memo as equivalent to the required plan for coverage. He believed that he had a plan as of July 24: that the obstetrician on call would deliver the babies of his patients who came to the hospital. After receiving no objection for 30 days, he assumed the plan was accepted. Dr. Perrott testified, however, that he had not intended in the memo to communicate any commitment by the hospital to care for unassigned patients; the only purpose of the reference to the on-call physician was to ensure the staff's compliance with all applicable laws prohibiting the refusal of care to women in active labor.

Effective July 29, 2001, appellant resigned from the medical staff at Natividad. Beginning August 2, 2001, patients began

appearing at SVMH, unaware that appellant's privileges had been suspended and expecting him to deliver their babies. In each case the obstetrician on call handled the delivery. On August 23, 2001, Sam Downing, the president and CEO of the hospital, wrote to appellant and King, stating that appellant had not complied with several requirements of the July 13, 2001 decision, including the order that he provide a plan of care for his patients and notify them of his suspension. In the hospital's view, this failure, together with the resignation of his privileges at Natividad, raised "serious questions of abandonment of his patients. At this point, his patients are {Slip Opn. Page 5} left without a choice: they do not know he has no privileges at Salinas Valley Memorial Hospital; he cannot care for them at Natividad Medical Center by his own volition; and they have not been transferred to a physician who has taken over for Dr. Yaqub." Downing also asserted that appellant had not taken the required courses on interpersonal relations and had not completed his patient medical records by July 19, 2001. The hospital demanded that appellant complete those records and submit a written plan of care to Dr. Perrott within 24 hours. The next day appellant's attorney notified Dr. Perrott that appellant had completed the records, that patients had and were being told about the suspension, that appellant was still seeking a temporary replacement (*locum tenens*), and that letters had been sent to all staff OB/GYN physicians asking for their assistance in covering appellant's practice. The following week King announced that all prenatal records through the end of September 2001 had been sent to the hospital, and he sent Dr. Perrott a proposal for a course in conflict resolution.

On September 7, 2001, Myers notified King that appellant had not yet "presented a comprehensive written plan of care" for his patients. The matter was referred to the hospital's Medical Executive Committee (MEC) for review. King responded immediately, pointing out that appellant had asked

for coverage from Dr. Gilbert, a physician in another practice, but had yet received no response. Arranging *locum tenens* was a time-consuming process, King noted. Drs. Ross and Halfpenny, however, were expected to be available to cover urgent-care patients. King also told Myers that appellant had more than 65 patients with delivery dates projected for the suspension period, and that the "vast majority" of the OB-GYN community had privileges at SVMH but were hostile toward appellant. Myers rejected these excuses, reminding King that it was appellant's, not the hospital's, obligation to provide a plan for coverage, and insisting that the hospital's emergency room was not such a plan. On September 12, 2001, Myers provided King with a list of sources appellant could use for *locum tenens*. The hospital refused appellant's request to share the cost of *locum tenens*. On September 21, 2001, {Slip Opn. Page 6} appellant notified Dr. Perrott that Dr. Mark Preston would cover his practice from September 22 to October 3, 2001.

On September 14, 2001, appellant received notice that the MEC was conducting an investigation to determine whether he had complied with the board's July 13 decision. Appellant appeared before the MEC on September 25, 2001. On October 12, 2001, the MEC suspended appellant's membership and privileges at the hospital, effective October 16, and recommended that those privileges be revoked. The MEC cited appellant's failure to (a) provide a plan of care for his patients, (b) complete courses on interpersonal and peer relations, and (c) notify his patients of his inability to care for them at SVMH. The MEC listed 12 examples of patients who had arrived at the hospital for delivery of their babies between August 2 and September 12, 2001. In each case the obstetrician on call delivered the baby, except for one, who was delivered by the nurses before the obstetrician arrived. The MEC specifically noted eight of these patients who were unaware that appellant would not be able to deliver their babies. In four cases the hospital did not have prenatal

records. On October 26 the MEC amended its notice of charges to add six more patients who were unaware of the suspension. For five of them, the prenatal records were not at the hospital. All of these patients appeared at the hospital between October 21 and October 24, beyond the original suspension period. On November 27, the MEC added another charge related to patient care along with a new charge of failing to maintain malpractice liability insurance. Appellant requested a "Fair Hearing" as provided for in the hospital's bylaws. In response, the hospital sent him a final notice of the charges and proposed action. The notice also informed appellant that Justice Nat A. Agliano (ret.) had been appointed as an independent hearing officer for the proceeding. The Hearing Panel was to be composed of Elizabeth Helfrich, Esq., William Keller, M.D., and Robert Van Horne, M.D. All three of these panel members had served on the Hearing Panel in the previous proceeding, and Justice Agliano had served as the hearing officer. {Slip Opn. Page 7}

Appellant objected to the appointment of Justice Agliano as hearing officer, and to all three of the Hearing Panel members. Because Justice Agliano had presided over the prior hearing, appellant believed that he might have already formed an opinion regarding the issues before him. Moreover, appellant suggested that Justice Agliano might not be impartial because his conduct in the prior proceeding was under judicial scrutiny. In addition, Justice Agliano had presided over a number of Fair Hearing proceedings at the hospital, resulting in "significant financial gain" to him, which presented another likely source of bias in the hospital's favor. Finally, appellant pointed to a "shocking" disclosure by the hospital: Justice Agliano had once served on the Board of Governors of the Salinas Valley Memorial Hospital Foundation, whose mission was fundraising for the hospital.

Appellant also objected to the three members of the proposed Hearing Panel on several grounds, including the fact that all had served on the Hearing Panel in the prior proceeding. According to appellant, the selection of these three violated the hearing provisions in the hospital's bylaws. After voir dire of each member and argument by counsel, the hearing officer overruled appellant's objections.

Appellant's Fair Hearing took place between January 9 and March 21, 2002. On April 15, 2002, the Hearing Panel issued its decision and recommendations. It found unproven the charges that appellant had failed to "take" courses in interpersonal relations, that he had failed to maintain malpractice insurance, and that he had failed to provide a plan for patient care. Nevertheless, that plan "was not a plan at all," because appellant had "willfully nullified" and "abrogated" it by resigning from Natividad and forcing his patients onto the on-call physicians at SVMH. The Hearing Panel described appellant's uncooperative conduct as "irrational . . . arrogant, defiant, and a threat to patient safety." It was "particularly egregious," in the panel's view, because it was a response to a board order designed to correct his past conduct. Accordingly, the Hearing Panel agreed with {Slip Opn. Page 8} the MEC in recommending revocation of appellant's membership and privileges at SVMH.

Appellant sought review by a review panel unassociated with the hospital. At the ensuing hearing, the entire board of directors constituted the appellate review panel (ARP). Appellant objected to the inclusion on the panel of three members, citing individual conflicts of interest and the members' participation in the prior review proceeding. He asserted two grounds for his appeal: a prejudicial failure to abide by "applicable laws" and insufficiency of the evidence to support the Hearing Panel's decision. Though it did not appeal, the MEC disputed the Hearing Panel's finding that appellant had provided a plan of care for his hospital patients.

After reviewing the record and hearing argument from both sides, the board issued its decision. It first rejected appellant's procedural challenges and his proposed disqualification of the board members from hearing the appeal. After addressing various evidentiary requests, the board considered the challenge to the factual conclusions and recommendations of the Hearing Panel. The board found insufficient evidence to support the Hearing Panel's finding that appellant had created a patient-care plan as required by the July 13, 2001 decision. The July 26, 2001 memorandum from Dr. Perrott to the obstetrical staff was inadequate, the board concluded, because it failed to name the physicians who would care for appellant's hospital patients, it did not contain all the elements of the required plan, and it was intended only to notify staff of appellant's status. In any event, the board found, the evidence was clear and convincing that appellant had "failed to abide by the terms of that plan and to provide for the care of his patients in a manner consistent with it. The board finally concluded that the "overwhelming weight of the evidence" supported the Hearing Panel's determination that appellant was not {Slip Opn. Page 9} qualified to be on the hospital's staff. fn. 3 Accordingly, the board upheld the summary suspension and revoked appellant's staff membership and clinical privileges at the hospital.

On September 25, 2002 appellant filed a petition in superior court for a writ of administrative mandamus under Code of Civil Procedure section 1094.5. Among the grounds he asserted were (1) the appearance of bias of the hearing officer, which should have disqualified him from presiding; (2) improper constitution of the Hearing Panel and the ARP; (3) improper fact-finding by the ARP; (4) error in the hearing officer's preclusion of testimony by two witnesses; and (5) insufficiency of the evidence to support the revocation of his membership and privileges. After receiving written and oral argument, the trial court declined to issue the writ and subsequently entered judgment for SVMHS.

Discussion

1. *Scope and Standard of Review*

The issues presented in this appeal fall into two general categories: (1) the fairness of the proceedings before the Hearing Panel and the ARP; and (2) the sufficiency of the evidence supporting the ARP's decision. Code of Civil Procedure section 1094.5 ("section 1094.5") governs our review, which follows the same course as that of the superior court. The court's inquiry in an administrative mandate matter includes the {Slip Opn. Page 10} questions of whether there was a fair trial and whether there was any prejudicial abuse of discretion. (§ 1094.5, subd. (b).) "Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (§ 1094.5, subd. (b).) In a case arising, as here, from a decision by a board of directors of a hospital district, "abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." (§ 1094.5, subd. (d).) Whether the hospital's determination was made according to a fair procedure is a question of law, which we consider independently based on the administrative record. (*Pomona Valley Hospital Medical Center v. Superior Court* (1997) 55 Cal.App.4th 93, 101.)

2. *Fairness of the Proceedings*

<PS:"HEADING 3?a. *Bias of Hearing Officer*

Appellant contends that issuance of the writ was required because the presiding officer at the Fair Hearing had a "fatal appearance of bias" caused by a financial conflict of interest. Justice Agliano, appellant argued, had a "long-standing and continuous" relationship with SVMH: He had previously served on the Board of Governors of the SVMH Foundation, a corporation that raised money for the hospital, and whose

governors were elected by the hospital's board of directors; he had served once as a mediator and once as an arbitrator in cases involving the hospital as a party; he had been engaged and paid by the hospital to be a hearing officer in at least two other SVMH cases concerning physician privileges; and he had been the presiding officer in appellant's earlier Fair Hearing. These circumstances, in appellant's view, created an "irreconcilable" economic conflict that compelled Justice Agliano's disqualification without regard to whether any actual bias was discernible. He renews these arguments on appeal.

Appellant cites *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017 (*Haas*), where an administrative hearing officer's pecuniary interest disqualified her from {Slip Opn. Page 11} presiding over a license revocation matter. In *Haas*, a hearing took place on the county's revocation of Haas's business license. Haas objected that the appearance of bias necessitated the hearing officer's disqualification because she had been selected and paid by the county, which foresaw using her as a hearing officer in the future. The Supreme Court held that "[c]ounties that appoint temporary administrative hearing officers must do so in a way that does not create the risk that favorable decisions will be rewarded with future remunerative work." (*Id.* at p. 1020.) The appointment procedure used by the county did create that risk because the county, as prosecuting agency, unilaterally selected the hearing officer, whose future employment in that capacity depended entirely on the goodwill of the county. In other words, "a direct, personal, and substantial pecuniary interest does indeed exist when income from judging depends upon the volume of cases an adjudicator hears and when frequent litigants are free to choose among adjudicators, preferring those who render favorable decisions." (*Id.* at pp. 1031-1032.)

We believe that the circumstances presented in this case fall within the ambit of *Haas*. Pursuant to Appendix Section II(G) of the hospital bylaws, the MEC unilaterally appointed Justice Agliano as hearing officer, and his fee was paid by the hospital. fn. 4 In notifying appellant of the appointment the MEC disclosed that Justice Agliano was "not affiliated with the MEC, or the Hospital, but he used to be a member of the Board of Governors of the Salinas Valley Memorial Hospital Foundation. His term ended December 31, 1998. The Foundation is a 501(c)(3) non-profit corporation whose mission is fundraising for the Hospital." The MEC further explained that the Foundation had no involvement in any medical staff matters, which were the responsibility of the board of directors. However, the board of directors elected the board of governors of the Foundation. {Slip Opn. Page 12}

This disclosure was one of the grounds on which appellant's objection to the appointment was based. He also pointed out that Justice Agliano had presided over three Fair Hearing proceedings in the past, including his own suspension hearing, and there was the potential for further appointments in the future. These facts were sufficient to create a "possible temptation" to favor the hospital.

It is true that Justice Agliano, unlike the hearing officer in *Haas*, did not serve as factfinder, participate in the deliberations, or issue a decision recommending action by the administrative board. fn. 5 Yet, as permitted in the bylaws, he provided key rulings on admissibility of evidence and access to information. fn. 6 He also ruled on the challenge to his own appointment as hearing officer, a determination upheld by the board itself. fn. 7

We also acknowledge that there was no evidence of actual prejudice or of a direct financial interest in the outcome of the case. As both the ARP and the trial court observed, "the

administrative record shows that the present hearing was conducted fairly and even-handedly by the presiding officer." fn. 8 The court further noted that in a previous {Slip Opn. Page 13} proceeding conducted by Justice Agliano the Hearing Panel had ruled in favor of the physician. Nevertheless, the Supreme Court emphasized in *Haas* that "the risk of bias caused by financial interest need not manifest itself in overtly prejudiced, automatic rulings in favor of the party who selects and pays the adjudicator." (*Haas, supra,* 27 Cal.4th at p. 1030.) " 'The Court's inquiry . . . is not whether a particular man has succumbed to temptation, but whether the economic realities make the design of the fee system vulnerable to a "possible temptation" to the "average man" as judge.' " (*Id.* at p. 1029.)

The trial court itself advised the board to "reevaluate the selection process for hearing officers" in light of *Haas*. Its suggestion was well taken. This case illustrates the necessity for careful examination of potential financial conflicts of interest in the selection of administrative hearing officers to obviate even the possibility of bias. Principles applicable to judicial officers in court proceedings provide comparable guidance; for example, Code of Civil Procedure section 170.1, subdivision (a)(3), states that a judge must be disqualified if he or she "has a financial interest in the subject matter in a proceeding or in a party to the proceeding." And Canon 2 of the Code of Judicial Ethics states that a judge "shall avoid impropriety and the *appearance* of impropriety in all of the judge's activities." (Italics added.) The commentary to this canon provides an objective test for the appearance of impropriety: The question is not whether the judge is actually biased, but "whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence." (See, e.g., *Hall v. Harker* (1999) 69 Cal.App.4th 836, 841, disapproved on another ground in *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336.) Measured by these

standards and underlying principles, SVMHS's procedures for appointing hearing officers were not consistent with the appearance of impartiality. Appellant's objection on this ground was sound, and his petition for a writ of mandate should therefore have been granted. {Slip Opn. Page 14}

Because it is likely that a new Fair Hearing will take place, we will address appellant's challenge to the composition of the Hearing Panel. It is not necessary, however, to discuss the exclusion of evidence made by the hearing officer, as such rulings are moot, or the sufficiency of the evidence supporting the Hearing Panel's decision. It also would be premature to consider appellant's objections to the composition or findings of the ARP, since we have no way of knowing if another appellate review hearing will even take place and, if so, whether the same members will constitute the ARP. We do caution, however, that if an appellate review hearing does take place without counsel for either side, it would strain the bounds of due process to allow the hospital's attorney, who took an active role in assisting the MEC to bring charges against appellant, to serve as advisor to the board in the hearing. (See *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 94 [city attorney's assistance and advice to hearing officer at administrative review hearing constituted an impermissible "overlapping of advocacy and decisionmaking roles" in violation of due process, as attorney had taken an active and significant role as advocate for the city in prior proceedings]; see also *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, 814-816 [city attorney's interactions with board on other occasions suggested probable influence and appearance of unfairness].)

<PS:"HEADING 3?b. *Composition of the Hearing Panel*
Appellant renews his claim that the Hearing Panel was improperly constituted because its members had all served on the Hearing Panel in appellant's suspension proceeding. This

time the panel members "were faced with the impossible task of wiping their mental slates clean and conducting an unbiased hearing" in which they had to "judge the feasibility" of the restrictions they had imposed on the earlier occasion. Thus, reconstituting the panel was, in appellant's view, a violation of Business and Professions Code section 809.2, subdivision (a), and section II(F) of the appendix to the Medical Staff Bylaws, and it "guaranteed" the unfairness of the new hearing. {Slip Opn. Page 15}

Business and Professions Code section 809.2, subdivision (a), requires a hospital's peer review hearing to be held before an arbitrator or "a panel of unbiased individuals who shall gain no direct financial benefit from the outcome, who have not acted as an accuser, investigator, factfinder, or initial decisionmaker in the same matter, and which shall include, where feasible, an individual practicing the same specialty as the licentiate." The applicable bylaws provision similarly prohibits service on the panel of any staff member who has "actively participated in the consideration of the matter at any previous level . . . ." fn. 9

Appellant contends that the composition of the Hearing Panel violated these provisions because its members had served as "factfinder and decisionmakers" in the first proceeding. However, we agree with the trial court's determination that this was not "the same matter." As the court observed in denying the writ, "[t]he clear intent of these prohibitions is to preclude a member from sitting on a panel and reviewing its own decision made in a previous hearing. That is not what happened here. . . . The first hearing and appeal dealt essentially with the Petitioner's level of medical competency and patient care. The second hearings . . . dealt with his compliance with the conditions of his suspension."

"The rule against overlapping functions . . . applies to prevent participation at ascending levels of the process, so that a

participant will not be in the position of reviewing his own decision or judging a man whom he has either charged or investigated." (*Rhee v. El Camino Hospital Dist.* (1988) 201 Cal.App.3d 477, 499.) {Slip Opn. Page 16} Because the current proceeding was not a different level of the same matter, the use of the same panel members did not pose the risk that they would be directly reviewing their own decision.

All of the Hearing Panel members were subjected to voir dire; all were confident in their ability to decide the current matter fairly and independently of the previous decision, even if appellant challenged the practicability and fairness of that decision. As this court recognized in *Rhee*, "prior knowledge of the factual background [that] bears on a decision is not sufficient to disqualify a decisionmaker." (*Id.* at p. 499; compare *Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648, 660 [unfair procedure where ad hoc committee's decision would be reviewed by executive committee, of which five members had served on ad hoc committee].) The bylaws also reflect this view, stating that "[k]nowledge of the matter involved shall not preclude a member of the medical staff from serving as a member of a Hearing Panel." Absent additional evidence that the panel members could not be impartial, their service in the prior matter did not, standing alone, disqualify them from participating in this proceeding. No violation of either the statute or the bylaws occurred in these circumstances. fn. 10 {Slip Opn. Page 17}

Disposition

The judgment is reversed. The trial court is directed to grant appellant's petition for a writ of mandate and order the challenged decision to be set aside. Costs on appeal are awarded to appellant.

Rushing, P. J., and Premo, J., concurred.

-FN 1. Appellant clarified at his Fair Hearing that Dr. Halfpenny did not agree to cover appellant's entire patient load, but only promised to help in any way he could. Appellant said he did not even request full coverage from Dr. Halfpenny but only asked whether Dr. Halfpenny could cover certain complicated cases.

-FN 2. The original draft of the memo stated, "Therefore, while many patients may transfer care to another facility or make arrangements to have another physician provide obstetrical services, there may be Dr. Yaqub patients presenting to SVMH for obstetrical care." Dr. Perrott removed the dependent clause at appellant's suggestion based on appellant's prediction that "the overwhelming majority will show @ SVMH."

-FN 3. In the board's view, even if Dr. Perrott's memorandum constituted the required plan, nevertheless "Dr. Yaqub did not sufficiently advise his patients that he would not be available to care for them at the Hospital. Dr. Yaqub did not adequately provide for the care of his patients during the period of his suspension. Dr. Yaqub continues to be unwilling and unable to cooperate with Hospital management, his peers, and his colleagues in the orderly and proper administration of the Hospital. Dr. Yaqub's conduct and attitude are arrogant and defiant. And last, but not least, Dr. Yaqub's conduct and attitude pose a continuing threat [to] patient safety. [Fn. omitted.] These findings compel the conclusion that Dr. Yaqub's continued practice at the Hospital posed an immediate danger to the health of its patient[s], and the ARP so finds."

-FN 4. The fee was paid through JAMS, which contracted with Justice Agliano to provide his services as hearing officer.

-FN 5. The record also contains no direct evidence regarding the hearing officer's assistance to the Hearing Panel in its deliberations at this proceeding. The record does indicate that in appellant's *prior* hearing on the suspension, Justice Agliano advised the Hearing Panel that the MEC had the burden of proof and that the charges must be proved by a preponderance of the evidence. Dr. Keller, one of the Hearing Panel members, recalled receiving such instruction and added that the panel had "felt well guided throughout the proceedings."

-FN 6. Under the hospital's bylaws, the presiding officer "ensures that all participants have a reasonable opportunity to be heard, maintains order, determines the order of procedure of the hearing in accordance with these bylaws, and makes rulings on questions pertaining to matters of procedure and admissibility of evidence."

-FN 7. The ARP found that "the selection of Justice Agliano and the panelists did not violate any of the various applicable statutes, the Bylaws, or principles of due process/fair procedure."

-FN 8. In the ARP's view, "not only is there no evidence of bias on the part of these individuals that impacted the fairness of the subsequent hearing and decision-making process, but there is no evidence of bias whatsoever."

-FN 9. Section II(F) of the Appendix to the Medical Staff Bylaws states, in pertinent part: "The Medical Executive Committee shall appoint a Hearing Panel. The Hearing Panel shall include not less [*sic*] than three members, at least two of whom must be physicians; one member shall have the same healing arts licensure as the physician requesting the hearing. Medical staff members who have actively participated in the consideration of the matter at any previous level, or who are in direct economic competition with the physician requesting

the hearing, are not eligible for appointment to the hearing panel."

-FN 10. Appellant makes a brief assertion that the Hearing Panel members had "disabling conflicts" but does not supply supporting argument, beyond the mention of Dr. Van Horne's "economic interest" in having sold the hospital a telephone network. We addressed a more fully developed argument on this point in H024953. For both of these reasons it is unnecessary to consider in the present appeal whether disabling conflicts existed.

Including findings of fact and a conclusion articulating the connection between the evidence produced at the hearing and the decision reached and an explanation of the procedure for appealing the decision. The report may recommend affirmation, modification or rejection of the original recommendations of the Executive Committee, and the reasons therefor. The arbitrator also may remand the matter to the Executive Committee for further consideration of specified issues. A copy of the report and recommendations shall be provided to the appellant, either by personal delivery or by registered or certified mail.

5. If dissatisfied with the report and recommendations of the arbitrator, the appellant and/or the Executive Committee may request appellate review of such report and recommendations. Appellate review shall be requested in writing, addressed to the Hospital administrator, within ten (10) days of receipt of the report. Failure to submit such timely request shall be considered a waiver of the right of further review or appeal and acceptance of the report and recommendation of the arbitrator.

6. Failure of the appellant to appear and proceed at the hearing before the arbitrator, without good cause, shall constitute his or her acceptance of the recommendation and action of the Executive Committee without any right to appellate review.

d. Appellate Review

1. If appellate review is timely requested by the appellant or the Executive Committee, the Chairman of the Board of Directors shall appoint a three member Appellate Review Panel, at least one of whom shall be a member of the Professional Staff of the Hospital who was not a witness at the prior hearing. The Chairperson of the Panel shall be selected by the Chairman of the Board of Directors.

2. The appellate hearing shall take place at a time and place agreed to by the Chairperson of the Appellate Review Panel and the Appellant, preferably within sixth (60) days of receipt of the request for hearing and shall be based upon the prior hearing. No additional witnesses or evidence shall be presented unless the panel is convinced that the witnesses or evidence could not have been presented at the prior hearing. Each party shall have the right to appear and respond, may be represented by legal counsel and may present a written statement or brief and an oral presentation to the Appellate Review Panel. If the panel allows witnesses to appear before it, they may testify and be cross examined. The chairperson of the panel shall determine admissibility of evidence and appropriate procedures for examination of witnesses before the panel.

3. A verbatim record shall be made of the appellate hearing. If either side chooses to engage a shorthand reporter, it shall bear the cost thereof.

(b). This proves that Respondents hired their "outside reviewer" *not* to perform an independent review as they had claimed, but to "vouch" their cases and to facilitate their intended outcome.

The outside reviewer's resultant report tainted the voting body in its vote to *issue* the Recommendation, and in its vote to *uphold* the Recommendation.

The fact that Respondents' inappropriately instructed and tampered-with "outside" reviewer *testified,* as Respondents' expert witness, at the Arbitration further violated Appellant's fair procedure rights. (POB-Point 6)

Other fair procedure violations are discussed below.

C. Arbitration Hearing

1. Arbitrator Prejudiced by False and Fabricated Material.

Respondents prejudicially placed false and fabricated materials from their illegal peer review activities and the Informal Hearing before the Arbitrator. (POB-Points 17, 18)

2. Arbitrator's Fee Paid 100% by Respondents.

That the Arbitrator was chosen and paid 100% by Respondents, and that the hearings were held at Respondents' Hospital likely added bias. Appelbaum, supra, recognized situations of bias, *apart from actual bias,* where *psychological tendencies and human weaknesses are too high to guarantee fair procedure.* (POB-Point 26)

3. Ruling on "Verbal" Charges not Part of the Written Notice of Charges Violated 809.3(1) and (4) and 809.2(d).

In five cases, the Arbitrator ruled on "verbal charges" that were not part of the written "Notice of Charges". Respondents introduced these ...

Respondents then filed the 805 report based on the upholding of the Suspension at the Informal Hearing.

2. The Formal Hearing Violated Fair Procedure.

(a) Statutory Law Prohibits A Party From Paying A Judge's Fee 100%. This Situation Also Constitutes Probability of Bias.

The Arbitrator's independence was impermissibly compromised. Respondents paid his fee 100%, and held the Arbitration at Respondents' hospital. Evidence Code 170.1(a) states a judge shall be *disqualified* if he has a financial interest in a *party* to the proceeding. (RB:21,L.9.)

This situation also constitutes a "probability for bias". Appelbaum, supra, 657. (RB:21,L.4-12.)

(b) The Arbitrator Ruled On "Verbal" Charges Not Part Of The Written Notice Of Charges.

RB:21,L.13-19 ignores AOB:23-24, wherein Appellant cited POB-Exhibit-27B-1, which cited: Tr.2483-2484:23-20;*Tr.*2479-2480: 21-8;*Tr.*3069:7-13;*Tr.*2899:6-14;*Tr.*3067-3068:23-13;*Tr.*2291-2292:25-1;*ARP.Tr.*68-69:22-15. These transcripts (Tr.3067-3068:23-13;*Tr.*2291-2292:25-1) prove the Arbitrator *defined* the "verbal" charges as not part of the *written* "Notice of Charges"(Resp.2232-2237), and specifically stated he would *not* address any "verbal" charges in his Findings.

Respondents claim "*Tr.2185:5-2186:*1" as the "consensus definition" between the Arbitrator and MEC. These transcripts confirm the Arbitrator defining the "verbal charges" as separate from the written "Notice of Charges", and that he will only focus on the "written Notice of Charges." (RB:22,L.3-12.)

59 component-charges. [7] Franz v. Board of Medical Quality Assurance (1982) 31 Cal.3d.124, states that if an Administrative body has imposed a single discipline based on multiple charges, some of which are not sustained by evidence, and if there exists any doubt whether the same action would have been taken on proper findings, the matter must be returned for redetermination.

On the charges the Arbitrator found against, his findings were contrary to the evidence. (See POB-Attachments Vols. 1, 2 and 3)

D. Appellate Review Board Hearing

1. Respondents Represented by Counsel at ARP Hearing when Appellant was Not, Violating 809.3(c).

At the ARP Hearing, Respondents were represented by their attorney, while Appellant had no attorney. Clark's dual role as Kaiser's counsel, and Legal Adviser to the ARP, violated 809.3(c) which states: "No peer review body shall be represented by an attorney if the licentiate is not so represented." (POB-Point 3)

Respondents' attorney, Yamamoto, was present at the Informal Hearing where the Bylaws violated state law by prohibiting Appellant an attorney present, violating 809.3(c). (POB-Point 12).

---

7. This number does not include "documentation charges", which were separate from the written notice of charges of 8/15/94, and not specified until the time of the Arbitration, over objection. (POB-Point 8.)

2. ARP Composition Violated Fair Procedure-Challenge Prevented.

The ARP was a Kaiser-appointed, Kaiser-affiliated, three-member panel with Kaiser's counsel appointed as the panel's "legal advisor". Reres, the panel's Chair, was a member of the Board of Directors of the Hospital and Health Plan, and was appointed by the Chairman of Board of Directors of the Hospital and Health Plan, who appointed the other two members of the ARP. [Resp.1731,1774]

Appellant stated to the panel he was in the position of asking Kaiser personnel to overturn a decision in Kaiser's favor. [ARP.Tr.48:10-13]

Applebaum, supra, states: "...the chances of a contradictory conclusion by another body within the hospital were virtually nil."

Applebaum, supra, p. 657 recognized "conflicts of interest as a bar to a fair hearing; "fair procedure includes the right to impartial adjudicators"; adjudicatory situations of "bias apart from actual bias" where "psychological tendencies...compels the conclusion that the risk of prejudgment is too high to guarantee fair procedure"; and "Biased decision makers are constitutionally impermissible and even the probability of unfairness is to be avoided". Withrow, supra.

While attempting to voir dire the three-member Kaiser-affiliated panel as to bias by their Kaiser affiliation, Reres interrupted, stating the panel was properly comprised per the Bylaws, and "the panel cannot have an opinion different than the bylaws." Reres omitted that the Bylaws [CT.64] state only *one* of the three-member panel must be from the Hospital's Staff. Reres then threatened Appellant accept the panel as comprised or the hearing could be terminated.

Respondents violated Appellant's fair procedure right to conduct a liberal examination to discover possible bias or conflicts of interest. Rosenblit, supra p. 231.

The ARP's composition and its probability for bias violated fair procedure.

* * *

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

DATE: 01/10/03 DEPT. 86

HONORABLE: DAVID P. YAFFE JUDGE

C. HUDSON DEPUTY CLERK
M. LOMELI CRT. ASST.
Deputy Sheriff NONE

Electronic Recording Monitor
D. CASE CSR #8739 Reporter

9:30 am BS069856

ROBERT J. JAFFE, M.D. (X) Plaintiff
Counsel:
IN PROPRIA PERSONA

vs.

KAISER FOUNDATION HOSPITAL
SOUTHERN CA Defendant
Counsel:
SARAH G. BENATOR(X)
LOWELL C. BROWN (X)

NATURE OF PROCEEDINGS:

HEARING ON PETITION FOR WRIT OF MANDATE;

RESPONDENTS, KAISER FOUNDATION HOSPITALS' NOTICE OF MOTION TO SEAL THE RECORD:

Matter comes on for trial and is argued.

The Petition for Writ of Mandate is denied.

Petitioner challenges an administrative decision terminating his staff privileges at Kaiser Foundation Hospital in Panorama City, California.

The administrative proceeding that resulted in petitioner's termination extended over a period of more than 5 years and were conducted in multiple stages as prescribed by sections 805 through 809.9 of the Business & Professions Code. The proceedings have generated an administrative record consisting of 16 volumes of documents consuming 9085 pages. A 32 volume reporter" transcript of arbitration proceedings consisting of 3,563 pages, and a 2 volume reporter's transcript of proceedings before an Appellate Review Panel, consisting of 321 pages, all of which is received in evidence.

In addition, petitioner has submitted two volumes of documents as an appendix to his opening brief, two volumes of exhibits to his reply brief, and three looseleaf volumes of documents described as an appendix. Respondent moves to exclude this material on the ground that it is not part of the administrative record. Petitioner contends that it is part of the administrative record. The objection is overruled and the above described materials submitted by petitioner are admitted by Petitioner are admitted into evidence.

Respondent moves to seal the entire administrative record on the ground that there is contained within it personal information concerning 15 patients who were treated by Petitioner. The motion is not narrowly tailored to those documents, or portions of documents, that contain such personal information, however, and the motion must therefore be denied because the court is not supplied with sufficient information.to make a narrowly tailored order as required by CRC 243.1(e)(1). The documents lodged by the parties, however, will be returned to counsel for respondent at the conclusion of this hearing. Counsel for respondent is

ordered to maintain said documents intact as received from the court until the judgment in this matter becomes final, and to transmit such documents to any other court that assumes jurisdiction over this matter.

Disciplinary proceedings were commended by respondent against petitioner in 1992 or 1993. A peer review committee considered some of the charges and found them to be warranted on August 20, 1993 (5 A.R. 2012).

An executive committee of the hospital staff recommended that petitioner be immediately suspended and that his staff privileges be terminated, in a letter to petitioner dated August 15, 1994 (5 A.R. 2233-2237). Petitioner then requested a hearing pursuant to section 809.1 of the Business & Professions Code, and a protracted arbitration proceeding culminated in the issuance of findings and decisions of the arbitrator on December 15, 1997 (1 A.R. 8-32). Petitioner then appealed the determination of the arbitrator to an Appellate Review Panel of the Board of Directors of respondent, which issued the final administrative decision on June 8, 1998 (1. A.R. 4-6), affirming the decision of the arbitrator and the termination of petitioner from the professional staff of the hospital.

Petitioner challenges the final administrative decision by petition for writ of administrative mandate pursuant to section 1094.5 of the Code of Civil Procedure.

Petitioner first contends that the Medical Executive Committee that recommended petitioner's termination on August 15, 1994 violated section 809.2 of the Business & Professions Code because the persons on the committee who investigated the charges against petitioner were the same persons who recommended his termination (Opening Brief 4:25-5:6). The contention has not merit because section 809.2 applies to the arbitration proceeding, not to the actions

of the Medical Executive Committee.

Petitioner's contentions numbered 4, 5, 6, 17 and 18 accuse Dr. Schottinger, the Chairperson of the Medical Executive Committee, of various acts of misconduct. This court does not review the actions of the Medical Executive Committee, so these contentions by petitioner are irrelevant. The Medical Executive Committee neither conducted the fair hearing that petitioner was entitled to nor did it render the final administrative decision that is to be reviewed by this court.

In his contention number 8, petitioner argues that his right to a fair hearing was violated because the Medical Executive Committee dropped six of the charges against petitioner after issuing its recommendation and added two new charges, which were then referred to arbitration. There was nothing wrong with the adding and deleting of charges as a result of the review of charges against petitioner by the Peer Review Committee and the Medical Executive Committee. These were investigative stages to determine which charges were valid and which were not. Petitioner makes no showing that he did not receive the information set forth in section 809.1(c) of the Business & Professions Code, before the arbitration hearing was conducted pursuant to section 809.2 of the Business & Professions Code.

Petitioner next contends, in the contention numbered 15 in his Opening Brief, that the Appellate Review Panel did not perform a proper and independent review of the evidence because it did not review all of the medical records submitted in the arbitration proceeding, and that the Appellate Review Panel did not articulate in its written decision a connection between the evidence produced in the arbitration and the conclusion that the Appellate Review Board Reached. These contentions have no merit. Petitioner cites no evidence in the administrative record to support his contention that the

Appellate Review Panel did not properly review the decision of the arbitrator. Section 809.4 of the Business & Professions Code does not require any appellate review at all, and it provides that if such review exists, it need not be de novo. Petitioner's contention that the Appellate Review Panel was required to independently review all of the medical records submitted in the arbitration proceeding is not supported by reason or authority. The decision by the Appellate Review Panel bridges the analytic gap between the raw evidence produced in the arbitration proceeding and the ultimate decision or order. That is all that is required. Topanga Association v. County of Los Angeles, 11, Cal.3d 506, 585 (1974).

In his contention number 16 petitioner contends that the Appellate Review Panel improperly disregarded the findings of the California Medical Board that petitioner complied with the requisite community standard of care. There is no evidence in the administrative record to support the contention that the Appellate Review Panel "disregarded" the medical board's finding or that it gave the Medical Board's finding "no weight." (Opening Brief 23:18-19, 26). The administrative record instead shows that the Appellate Review Panel "carefully reviewed" the letter from the Medical Board (1 A.R.5, paragraph 4), and found that petitioner's quality of care and services did not comply with the hospital's standards. There is also no evidence in the administrative record that the Appellate Review panel imposed a higher standard than the Medical Board. It is equally likely that the findings of the Appellate Review Panel and the medical Board were different because they were based upon different evidence concerning petitioner's deviation from the same standard of care.

In his contention number 26, petitioner contends that the arbitration proceeding was biased because the arbitrator's fee was totally paid by respondent. (Opening Brief 34:9-15).

The contention has no merit because no such objection was raised by petitioner early enough so that something could be done to correct it, and no bias on the part of the arbitrator is shown. Such an arrangement for the payment of the arbitrator's fee, if it did exist, does not violate Business & Professions Code section 809.w because there is no showing that the arbitrator's entitlement to a fee, or the amount thereof, was in any way affected by the outcome of the proceeding.

In his contention number 29, petitioner contends that the finding by the arbitrator that petitioner maintained an inappropriate practice of using the same syringe to inject multiple patients (1 A.R. 10:8-11, which finding was upheld by the Appellate Review Panel (1 A.R. 5, Paragraph 3), is not supported by the evidence. Petitioner attacks the finding as not supported by the weight of the evidence (Opening Brief 38:13-39:15), but the standard by which this court reviews the administrative finding is on the basis of whether it is supported by substantial evidence in light of the whole record. Code of Civil Procedure section 1094.5(d). The finding is so supported by the admissions of petitioner himself; to the Appellate Review Panel (1 ARP Transcripts 75:7-23); to Dr. Potyk (1 Arbitration Transcript 58:12-18); and to Dr. McKenzie (31 Arbitration Transcript 3386:2-15.

The remaining contentions made by petitioner are also without merit, and petitioner failed to exhaust his administrative remedies with respect to said contentions because he did not make them before the Appellate Review Panel. It is error for this court to grant relief on legal theories not presented during the administrative proceedings. The exhaustion of remedies doctrine applies equally to questions of law and fact. NBS Imaging Systems v. Board of Control, 60 Cal.App.4th 328 (1977).

Counsel for respondent is to submit a proposed judgment to

this department within 10 days together with a proof of service showing that a copy has been served upon petitioner by hand delivery or overnight courier. The court will hold it or 10 days before signing and filing it.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

DATE: 03/124/03 DEPT. 86

HONORABLE: DAVID P. YAFFE JUDGE

C. HUDSON DEPUTY CLERK
M. LOMELI COURTROOM ASSISTANT
Electronic Recording Monitor
Deputy Sheriff: NONE C. Elkins CSR #7533 Reporter

9:30 am BS069856

ROBERT J. JAFFE, M.D. (X) Plaintiff
Counsel:
IN PROPRIA PERSONA

vs.

KAISER FOUNDATION HOSPITAL
SOUTHERN CA Defendant
Counsel:
SARAH G. BENATOR(X)
LOWELL C. BROWN (X)

NATURE OF PROCEEDINGS:

MOTION FOR NEW TRIAL:

PETITIONER, ROBERT J. JAFFE, M.D.'S NOTICE OF MOTION FOR A NEW TRIAL:

PETITIONER, ROBERT J. JAFFE, M.D.'S NOTICE OF MOTION TO VACATE THE JUDGMENT:

Matter comes on for hearing and is argued.

Petitioner's motions for new trial and to vacate judgment are denied.

NUNC PRO TUNC

Due to inadvertence and clerical error, the minute order of January 10, 2003 does not accurately reflect the order of the Court for Department 86. Said minute order is hereby corrected nunc pro tunc as of January 10, 2003 as follows:

BY ADDING ON PAGE 8, AS PARAGRAPH 1, AFTER LINE 1, the following:

"The administrative record is ordered forthwith returned to the party who lodged it, to be preserved without alteration until the Judgment herein is final, and to be forwarded to the Court of Appeal in the event of an appeal."

All other orders remain in full force and effect.

MINUTES ENTERED
03/24/03
COUNTY CLERK

MEDICAL BOARD OF CALIFORNIA
ENFORCEMENT PROGRAM
20631 VENTURA BLVD., Suite 201
WOODLAND HILLS, CALIFORNIA 91364
(818) 596-4187

May 1, 1998

Robert Jaffe, M.D.
22141 Burbank Blvd., Suite 5
Woodland Hills, CA 91367

REGARDING: Case No. 05-94-43374

Dear Dr. Jaffe:

I would like to inform you that we have completed our investigation into the information that was brought forth from Kaiser Foundation Hospital with the above assigned complaint number and we have closed our case because we have found no deviation from the Standard of Care in the Community as related to the information that has been reviewed. Please be advised the review of your case included all the information contained in charges from Kaiser Foundation Hospital. This is the same information you provided us in letter of 8/15/94 from Kaiser.

Please let me know if you have any further questions or concerns as I may be contacted directly at the above address or phone number.

Sincerely,
/s/ Mark Gonzalez
MARK GONZALEZ
SUPERVISING INVESTIGATOR

MEDICAL BOARD OF CALIFORNIA
ENFORCEMENT PROGRAM
20631 VENTURA BLVD., Suite 201
WOODLAND HILLS, CALIFORNIA 91364
(818) 596-4187

March 19, 1998

Robert Jaffe, M.D.
22141 Burbank Blvd., Suite 5
Woodland Hills, CA 91367

REGARDING: Case No. 05-94-43374

Dear Dr. Jaffe:

I would like to inform you that we have completed our investigation into the information that was brought forth from Kaiser Foundation Hospital with the above assigned complaint number and we have closed our case because we have found no deviation from the Standard of Care in the Community as related to the information that has been reviewed.

Please let me know if you have any further questions or concerns as I may be contacted directly at the above address or phone number.

Sincerely,

/s/ Mark Gonzalez
MARK GONZALEZ
SUPERVISING INVESTIGATOR

MG/rm

Petitioner invalid, or proved Petitioner to be within the standard of care. It was further shown by the independent experts who unlike Kaiser's outside reviewer, matched the fields they were asked to review, that the MEC was incorrect in the reporting of their medical facts.

See List of some examples of MEC's misrepresenta-tions, omissions, failure to report in light of the full facts, and bad faith tactics in its reporting of the 16 cases at issue (See Appendix 25 B). See (Appendix 25C) for Dr. Goldstein's Closing Statement Section II p. 3-9 addressing the MEC's tactics, misrepresentations, misconstructions, missteps, corrupted peer review process and unsubstantiated claims.

The aforementioned bad faith acts culminated in Petitioner suffering a stress-related myocardial infarction in 1995 in a then 49-year old healthy individual with minimal risk factors. (Appendix 25D, declaration from Sidney Stewart, M.D.) Additionally, the resultant filing of the 805 report resulted in irrevocable damage to his professional reputation.

26. THE FACT ARBITRATOR'S FEE WAS TOTALLY PAID BY THE MEC LIKELY ADDED ANOTHER ELEMENT BIAS INTO THE PROCEEDINGS.

The fact that the Arbitrator's fee was totally paid by the MEC over the complete two and ½ year span of the hearings likely added another element of bias, and violated Petitioner's right to a fundamentally fair hearing, and his right to an impartial decision by the Arbitrator. See Bowles Fin.Grp, Inc. v. Stifel, 22 F.3d 1010; 1994 U.S.App. This is a further violation of B&P Code 809.1(a) in that the Arbitrator gained financial benefit directly from the MEC.

27. THE ARBITRATOR PREJUDICIALLY ABUSED HIS DISCRETION AND VIOLATED PETITIONER'S RIGHT TO A FUNDAMENTALLY FAIR TRIAL, AND HIS RIGHT TO AN IMPARTIAL DECISION. SEE BOWLES, SUPRA.

A. After the Arbitrator stated in testimony that he would not be prejudiced by the fact that Petitioner would not be testifying, the Arbitrator, in his findings, used the fact the Petitioner did not testify against him.

See testimony of Arbitrator stating he would not be biased by the fact that Petitioner would not be testifying. (Appendix point 27A -1).

See Arbitrator's Written Decision evidencing that the Arbitrator had been prejudiced by the fact that Petitioner did not testify, and specifically disregarded Petitioner's supportive

* * *

and/or the Credentials & Privileges Committee, or both. Both the "Special Investigative Committee" and the Credentials & Privileges Committee are investigative bodies; The MEC is the voting body who presided and voted at the two hearings. Therefore, under B&P Code § 809.2 the said members of the MEC (listed in Appendix 2A) were prohibited from voting at the two hearings because of their overlapping roles on the Investigative or Fact-Finding Committees in Petitioner's case.

Additionally, Rosenblit v. Superior Court (1991) 231 Cal.App.3d 1434 stated "the court does recognize conflicts of interest as a bar to a fair hearing. Hackethal v.Calif. Medical Assoc. (1982) 138 Cal.App.3d 435, 443 stated ". . .A person whose rights are being determined has a right to an impartial panel to determine those rights; and Applebaum v Board of Directors, 104 Cal.App.3d. 648; 163 Cal.Rptr. 831 stated "The right to a fair procedure includes the right to impartial adjudicators.

(See letter of 8/3/94 from Law Offices of Henry Fenton showing that Petitioner's request for the Informal Hearing was timely as required under B&P Code 809.2 (Appendix 2B Ex 93

3. IT WAS IMPROPER FOR HARRIET CLARK, WHO SERVED AS VICE PRESIDENT AND ASSISTANT GENERAL COUNSEL TO KAISER HEALTH PLAN AND KAISER HOSPITAL, TO ALSO SERVE AS THE LEGAL ADVISER TO THE PURPORTEDLY IMPARTIAL APPELLATE REVIEW BOARD PANEL.

The fact that the Appellate Review Board Panel, whose responsibility was to have been an impartial and objective Adjudicating Body, was being advised by a legal adviser who also concurrently served as Kaiser's counsel,

violated Petitioner's right to a fundamentally fair hearing, and violated his right to a panel of impartial adjudicators. Not only is this a clear conflict of interest, but, additionally, Harriett Clark's duel role as Kaiser's counsel, and Legal Adviser to the Appellate Review Panel is tantamount to Kaiser being represented by counsel at a hearing where Petitioner was not. This violates B&P Code 809.3(C) which states that "No peer review body shall be represented by an attorney if the licentiate is not so represented. "

Additionally, the Rosenblit court stated "[T]he court does recognize conflicts of interest as a bar to a fair hearing;: Hackethal v. California Medical Assoc. (1982) 138 Cal.App.3d 435, 443 stated "A person whose rights are being determined has a right to an impartial panel to determine those rights; and Applebaum v. Board of Directors, supra states: "The right to a fair procedure includes the right to impartial adjudicators."

(See letterhead from Harriett Clark dated 2/17/98 evidencing that she was Vice President and Assistant counsel to Kaiser Health Plan and Kaiser Hospital (*Appendix point 3 -A.*)

(See testimony of Harriett Clark evidencing that she also served as Legal Adviser to the Appellate Review Board panel at the March 23 and 24, 1998 hearings. (*Appendix 3 – B).*

(See letter of 2/27/98 from Kirk Miller, Secretary of Kaiser, listing the members of the panel, and stating that Harriet Clark will serve as legal advisor to the Appellate Review Board panel *(Appendix 3 – C.*)

4. DR. SCHOTTINGER'S CONFLICTING ROLES IN PETITIONER'S CASE AS A PROCTOR, AS CHAIRMAN OF THE SPECIAL INVESTIGATIVE COMMITTEE, AS CHAIRMAN OF THE MEC (THE VOTING BODY), AND IN SUBMITTING THE FINAL REPORT LETTER TO THE MEC, AND THEN AS CHAIRMAN AND VOTING MEMBER OF THE MEC, AND AS REPRESENTATIVE OF THE MEC AT ALL FOUR OF THE HEARINGS; IN CLEAR VIOLATION OF B&P CODE § 809.2.

B&P Code § 809.2 prohibits the panel members who preside over the hearings from also serving as an accuser, investigator, fact finder, initial decision-maker and voting member in the same matter.

In Petitioner's Closing Brief, *(P.5, ¶ 2,)* Dr. Goldstein, Petitioner's representative and Chief of Medicine USC, addressed Dr. Schottinger's conflicting roles (*Appendix 4-A).*

As well, see Dr. Goldstein testimony at the Arbitration hearing regarding Dr. Schottinger's conflicts of interest as follows (*see Appendix 4 –B)*:

The court in Rosenblit, supra, addressed a lesser conflict of interest situation as follows:

"The court does recognize conflicts of interest as a bar to a fair hearing Amicus curiae suggests that members of judicial review committees are under no explicit or statutory duty to recuse themselves , and therefore, a physician must be afforded the opportunity to conduct a liberal and probing oral examination of the committee members which is calculated to discover {Page 231 Cal.App.3d 1449} possible bias or conflicts of interest. Here the chairman of the Appellate

* * *

93.). Because the Kaiser Bylaws barred Petitioner from having his attorney present at the "Informal Hearing" Petitioner was therefore not aware of his right under B&P Code 809.2(c) to voir dire the panel for bias. This resulted in an injustice.. In Rosenblit v. Superior Court, supra, the court found a similar situation to be untenable. In that case, Dr. Rosenblit filed a writ petition challenging the fairness of a hearing intended to review the Staff's summary suspension of his staff privileges. He claimed, inter alia, that he had not been allowed to have an attorney present during voir dire of the hearing panel members. The court of appeal held that Rosenblit's inability to be represented by counsel at the voir dire was inherently unfair:

"We observe that Hospital had barred Rosenblit's lawyer from the hearing. Alone and struggling to save his career, Rosenblit hardly could be expected to risk the wrath of those sitting in judgment by challenging their representation of impartiality. Hospital, as in Hackethal, argues Rosenblit waived his objection by readily accepting the panel The trial court agreed. Under Hackethal, however, the trial court *could not find that a layperson, unrepresented by counsel, in these circumstances* waived his right to object.

In this case, no voir dire occurred because as a layperson, unrepresented by counsel, Petitioner not aware of this right. Furthermore, had Petitioner been aware of this right, as a layperson, unrepresented by counsel, as stated in Rosenblit, he could be not have been expected to risk the wrath of those sitting in judgment by challenging their representation of impartiality.

14. At the Appellate Review Board Hearing, Petitioner Attempted to Voir Dire the Panel, But Was Denied His Right Under B&P Code 809.2(c), to a Reasonable Opportunity to Challenge the Impartiality of the Three-

Member Panel. His Challenge to the Impartiality of the Three-Member Panel was Improperly Limited.

1. The hearing officer violated B& P Code 809.2(C) by improperly rejected Petitioner 's line of questioning on whether the panel members would be biased by the fact that they were Kaiser-affiliated, and if they felt there should be another way of choosing the panelists; and

2. While attempting to challenge the impartiality of the panel members on the basis that all were made up of Kaiser personnel, the Hearing Officer ruled incorrectly by stating that the panel members, made up solely of Kaiser personnel, was in accordance with the Bylaws. (*P 9L. 25 to P. 10 L. 11*). This is incorrect. The Bylaws, state that only one of the three member panel must be from must be from the professional staff of the hospital: (see Appendix 14–D)

3. The testimony (*Appendix, point 14-A*) shows that Dr. Reres shut down Petitioner's line of questioning, while he was attempting to question the panel members on whether they would be biased by the fact that they were Kaiser personnel. This violated Petitioner's right to conduct a liberal and probing oral examination of the panel members which is calculated to discover possible bias or conflicts of interest. (See Rosenblit, supra.)

Recognizing the conflict of interest, Petitioner stated to the panel that he is now in the position of asking a panel of Kaiser personnel to overturn a decision made in Kaiser's favor (*p. 48 L. 10-13*). The testimony shows Petitioner's attempt at challenging the impartiality of the panel on the basis that it was solely made up of Kaiser personnel, and further shows that Dr. Reres improperly shut down this line of questioning. Dr. Reres statements "In no way will this panel or will I allow a ruling that this panel make a decision that is not in concert with the bylaws of the organization." . . .

the panelists cannot act in opposition to the Bylaws period, and that the panelists "cannot have an opinion different than the bylaws in the organization of this meeting." *(Appendix point 14-A)* evidences the way in which Dr. Reres would not allow the panelists to answer.)

Applebaum v. Board of Directors , supra, P. 6: states "*The right to a fair procedure includes the right to impartial adjudicators*". Hackethal v. California Medical Assoc. (1982) 138 Cal.App.3d 435, 443 states" "[f]Airness requires a practical method of testing impartiality." . . A person whose rights are being determined has a right to an impartial panel to determine those rights . . . Voir dire is the traditional and accepted method of selecting an impartial tribunal. These adjudicators were all Kaiser affiliated and thus held conflicts of interest and/or bias. This panel was extremely biased because Reres who chaired the Appellate panel was not only a Kaiser Affiliate, but she was a member of the Kaiser Board of Directors. (see Appendix –14 E).

It is to be noted that prior to the hearing Petitioner had requested via certified letters dated 2/17/98 and 2/24/98 that the panel not be Kaiser affiliated (*see Appendix, point 14 -B*). Such request is in keeping with the AMA Guidelines regarding peer review which state that "when objectivity cannot be assured, such as in cases of Hospital control or group practice arrangements, *the Hospital has to request or at least concur in the request for such service*." (*Appendix, 14-C*) Regarding conflicts of interest, Rosenblit, supra, stated:

"The court does recognize conflicts of interest as a bar to a fair hearing Amicus curiae suggests that members of judicial review committees are under no explicit or statutory duty to recuse themselves, and therefore, a physician must be afforded the opportunity to conduct a liberal and probing oral examination of the committee members which is calculated

to discover {Page 231 Cal.App.3d 1449} possible bias or conflicts of interest. . . . Here the chairman of the appellate board and the chairman of the judicial review committee had both been treating physicians on one of the cases under scrutiny. In circumstances such as these, an opportunity to expose potential bias essential. Rosenblit was denied any semblance of fairness by the secret unreported voir dire conducted by the members themselves".

The Rosenblit court also affirmed the trial court's conclusion that voir dire had been unduly restricted. (Id.at.443.) "Rosenblit contends the secret voir dire of the hearing panel impermissibly compromised his ability to obtain a fair hearing. We agree."

15. The Appellate Review Board Did Not Perform a Proper and Independent Review Without Reviewing the Medical Records, and Did Not Articulate in its Written Decision a Connection Between the Evidence Produced at The Hearing And The Conclusion It Reached.

The Appellate Review Board admitted that it had not received nor reviewed the medical records. (see Appendix, point 15-A.) The medical records contained data vital to a fair evaluation, especially since Petitioner had raised the issue before the Appellate Review Board that the MEC had not reported the true and correct facts of the medical records, and that the arbitrator had ignored the medical records (see Appendix, point 15- B). It was not possible for the Appellate Review to make a proper ruling without fully reviewing the medical records.

Furthermore, without the medical records, how could the Appellate Review Board have concluded what it stated in its written decision regarding the medical records (Appendix 15-C).

DR. ROBERT JAFFE: And it's my understanding that the materials that the three panelists are discussing is the testimony in the transcript. Is that correct? Are there any other materials that you have reviewed or should have reviewed?

DR. GORDON: There's a whole box full of binders like this. I only brought two out of six or eight of them.

DR. ROBERT JAFFE: and I don't think that the panelists, with all due respect -- and I appreciate and have a good sense of your sincerity, but I don't think you answered my basic question, and that was should we be proceeding today given the number of issues that I've laid out, and those issues being that there was a miscommunication or misunderstanding. Whose fault was it would be up for grabs. It's not a question, I think, of fault. the facts are that there was a misunderstanding. we're here for a good effort and the truth to be gained. and so the question of issue would be proceeding, and the other question is to the panelists, should Dr. Jaffe have had a say in the choosing of the panelists, and should they have been from non-Kaiser surroundings.

DR. RERES: Dr. Jaffe, we are here at your request in an appeal of the arbitration process. if we

Continue with this meeting, it is at your request. It is not our decision to be making whether or not the appellate review shall continue. If you feel that it does not serve your purposes, then we can terminate the hearing. In no way will this panel or will I allow a ruling that this panel make a decision that is not in concert with the bylaws of the organization.

DR. ROBERT JAFFE: Okay. so I appreciate what you're saying, and given that I'm in the hot seat and extremely anxious, let me think a little bit about what you said, but still, my question was what are the wishes of the panel. Does the panel want to proceed, or does the panel want to wait and say Dr. Jaffe should be certain that he's prepared?

Does the panel state, "well, yes, the bylaws are as printed, but should there be another way of choosing the panelists?" and that's my question that I -- and I throw it out not for me to make a decision whether to proceed today but to get their input before. If you ask me to make a decision today, then I can, but I want to respect and I want to hear what the panelists say.

DR. RERES: The panel cannot act in opposition to the bylaws, period. We are here today at your request. if you choose to not continue with the hearing, then it is your choice and not the panel's. The

panel is here to do the work of an appellate review.
DR. ROBERT JAFFE: All right. So I understand you correctly, the panel cannot answer my question. Do I understand you correctly? They are here by the bylaws and are not to give an opinion to my questions?
DR. RERES: They cannot have an opinion different than the bylaws in the organization of this meeting.
DR. ROBERT JAFFE: I see. Can I ask their own individual opinions?
DR. RERES: You can ask for their opinions. Dr. Patel?
DR. PATEL: Yes, I feel that we need to go through and abide by the bylaws of the hearing. Again, I think the fact that we've come here without any prior knowledge of the case after being appointed to the review panel is in accordance with any bylaws, as my understanding, and I feel that it is important to proceed.
DR. RERES: Dr. Gordon?
DR. GORDON: I would agree with Dr. Patel. we really have to go by the bylaws. We have no other choice.
DR. RERES: Dr. Jaffe.
DR. ROBERT JAFFE: You're asking for my

opinion?
DR. RERES: I'm stating we have answered your question.
DR. ROBERT JAFFE: I see. Okay. all right. I accept what you have said, and now you have said it is my decision whether to proceed, and if I say,"Do you mean proceed today, or is it possible to ask for a continuance?" What is the answer?
DR. RERES: When did you receive a copy of the bylaws?
DR. ROBERT JAFFE: I honestly do not recall, but it would have been within the last few weeks by way of Ms. Clark's office, although, of course, throughout the years, I've received copies of the bylaws.
DR. RERES: Have you received a copy of the transcript of the pleadings?
DR. ROBERT JAFFE: I don't know what you mean. I'm sorry.
DR. RERES: Have you received a copy of the arbitration hearing officer's assessment?
DR. ROBERT JAFFE: you mean the written decision by the arbitrator?
DR. RERES: yes.
DR. ROBERT JAFFE: Yes, I have.
DR. RERES: Included in that was the appeal

* * *

Court of Appeal, Second Appellate District, Division Five

No. B166698

S130599

IN THE SUPREME COURT OF CALIFORNIA

En Banc

ROBERT J. JAFFE, M.D., Plaintiff and Appellant,

v.

KAISER FOUNDATION HOSPITAL, ET AL., Defendants and Respondents

---

Request for judicial notice denied
Petition for review DENIED.

Werdegar, J. was recused and did not participate

SUPREME COURT
FILED
February 16, 2005
Frederick K. Ohrich Clerk
Deputy

George
CHIEF JUSTICE

---

(3)

No. 04-1536

Supreme Court, U.S.
FILED
JUN 17 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ROBERT J. JAFFE, M.D.,

Petitioner,

v.

KAISER FOUNDATION HOSPITAL, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal Second Appellate District

---

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TAMI S. SMASON *
LOWELL C. BROWN
SARAH G. BENATOR
FOLEY & LARDNER LLP
2029 Century Park East
Suite 3500
Los Angeles, California 90067
(310) 277-2223

* Counsel of Record

Attorneys for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Supreme Court has jurisdiction to review a private hospital's peer review action against a physician based on the physician's claim that the peer review action violated the physician's Due Process rights guaranteed by the United States Constitution, when that peer review action (a) did not involve any state action, and (b) involved medical judgments made by private parties according to professional standards that are not established by the state?

2. Whether the United States Supreme Court has jurisdiction to review a state court's analysis of state law based on a claim that the state court's analysis is inconsistent with federal case law, when the federal cases cited address an entirely different subject matter?

3. Assuming that the United States Supreme Court does have jurisdiction to hear a matter that involves a private hospital's peer review action against a physician, whether the private hospital's payment of a private arbitrator's fees infringes on any Constitutionally protected right when (a) the arbitrator was mutually appointed by the parties after voir dire; (b) the arbitrator's fees were not dependent on the arbitration's outcome; (c) the physician never offered to pay any portion of the arbitrator's fees; and (d) the physician never objected to the appointment of the arbitrator or the hospital's payment of the arbitrator's fees until after the conclusion of the arbitration?

CORPORATE DISCLOSURE STATEMENT

Neither Kaiser Foundation Hospital, Southern California Permanente Medical Group, nor Kaiser Foundation Health Plan, Inc., has a parent corporation; nor do any of them issue any stock; therefore, no publicly owned company owns ten percent or more of their stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
JURISDICTION	3
STATEMENT OF THE CASE	3
I. STATE LAW GOVERNING HOSPITALS AND MEDICAL STAFF PEER REVIEW	3
II. RESPONDENT'S ACTION AGAINST PETITIONER AND SUBSEQUENT HEARING	5
III. STATE COURT PROCEEDINGS	7
ARGUMENT	8
I. PETITIONER FAILS TO RAISE A FEDERAL QUESTION FOR REVIEW	8
A. The Due Process Clause Of The Constitution Is Inapplicable	8
B. No Federal Statute Is At Issue	14
C. The Cases Petitioner Cites Regarding Judicial Bias Are Inapplicable	16
II. THE STATE COURTS' DECISIONS ARE CONSISTENT WITH STATE LAW	18
CONCLUSION	20

TABLE OF AUTHORITIES

CASES — Page

Aetna Life Insurance Company v. Lavoie, 475 U.S. 813 (1986) 17
Bell v. Sharp Cabrillo Hospital, 212 Cal. App. 3d 1034 (1989) 4
Blum v. Yaretsky, 457 U.S. 991 (1982) 9, 10, 13, 14
Bok v. Mutual Assurance, Inc., 119 F.3d 927 (11th Cir. 1997) 15
Brown v. Vance 637 F.2d 272 (5th Cir. 1981)..... 16, 17
Carter v. Norfolk Community Hospital Association, 761 F.2d 970 (4th Cir. 1985)..... 11
Crowder v. J. K. Conlan, 740 F.2d 447 (6th Cir. 1984)..... 11
Elam v. College Park Hospital, 132 Cal. App. 3d 332 (1982)..... 4
Engalla v. Permanente Medical Group, Inc., 15 Cal. 4th 951 (1997)..... 20
Ezpeleta v. Sisters of Mercy Health Corp., 800 F.2d 119 (7th Cir. 1986)..... 11
Gibson v. Barryhill, 411 U.S. 564 (1973) 17
Goldberg v. Kelly, 397 U.S. 254 (1970)..... 17
Goss v. Memorial Hospital System, 789 F.2d 353 (5th Cir. 1986) 12, 13
Haas v. County of San Bernardino, 27 Cal. 4th 1017 (2002)..... 18, 19
Hancock v. Blue Cross-Blue Shield, Inc., 21 F.3d 373 (10th Cir. 1994) 15
Hodge v. Paoli Memorial Hospital, 576 F.2d 563 (3d Cir. 1978) 12
Hongsathavij v. Queen of Angels Hollywood Presbyterian Medical Center, 62 Cal. App. 4th 1123 (1998)..... 4
Hurtado v. Statewide Home Loan Company, 167 Cal. App. 3d 1019 (1985)..... 20

TABLE OF AUTHORITIES—Continued

	Page
Jackson v. Metropolitan Edison Company, 419 U.S. 345 (1974)	10
Liljeberg v. Health Services Acquisition Corporation, 486 U.S. 847 (1988)	17
Loh-Seng Yo, M.D. v. Cibola General Hospital, 706 F.2d 306 (10th Cir. 1983)	11
Lowe v. Scott, 959 F.2d 323 (1st Cir. 1992)	12
Mendez v. Belton, 739 F.2d 15 (1st Cir. 1984)	11
Pariser v. Christian Health Care System, Inc., 816 F.2d 1248 (8th Cir. 1987)	11
Tumey v. Ohio, 273 U.S. 510 (1927)	16
Ward v. Village of Monroeville, Ohio, 409 U.S. 57 (1972)	16
Wayne v. Genesis Medical Center, 140 F.3d 1145 (8th Cir. 1998)	15
Withrow v. Larkin, 421 U.S. 35 (1975)	17
Wong v. Stripling, 881 F.2d 200 (5th Cir. 1989)	10
Yaqub v. Salinas Valley Memorial Healthcare System, 122 Cal. App. 4th 474 (2004)	18, 19

STATUTES

28 U.S.C. § 1257	8
28 U.S.C. § 1257(a)	8
42 U.S.C. § 1983	11, 12
42 U.S.C. § 11101	14
42 U.S.C. § 11111	5, 14
42 U.S.C. § 11111(a)	15
42 U.S.C. § 11112	5, 14, 15
42 U.S.C. § 11133	4
Cal. Code Regs. tit. 22, § 70701(a)(1)(E)	4
Cal. Code Regs. tit. 22, § 70701(a)(7)	3
Cal. Code Regs. tit. 22 § 70703(a)	4
Cal. Bus. & Prof. Code § 805 (West 2005)	4

TABLE OF AUTHORITIES—Continued

	Page
Cal. Bus. & Prof. Code § 809, *et seq.*	5
Cal. Bus. & Prof. Code § 809.2	6
Cal. Bus. & Prof. Code § 809.2(a)	18
Cal. Bus. & Prof. Code § 809.4	6
Cal. Bus. & Prof. Code § 809.5	5
Cal. Civ. Code § 43.7	12
Cal. Civ. Code § 43.8	12
Cal. Code Civ. Pro. § 1094.5	7
Cal. Code Civ. Pro. § 1094.5(c)	7
RULES	
S. Ct. R. 10(b) and 10(c)	3
Cal. Rules of Court, Rule 29.4	19
MISCELLANEOUS	
Constitution, Article XIV, Section 1	8

IN THE

Supreme Court of the United States

No. 04-1536

ROBERT J. JAFFE, M.D.,

Petitioner,

v.

KAISER FOUNDATION HOSPITAL, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal Second Appellate District

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Despite citing various federal statutes and cases in his petition for certiorari, Petitioner fails to raise any valid federal question or other issue that would be appropriate for this Court's review. No provision of the Constitution or federal statute is at issue. No rift exists between state law and federal law. No conflict exists between a state court ruling and a decision of any United States Court of Appeals. Instead, Petitioner simply complains about the state court's analysis of how state law applies to a private entity. Because no federal question is raised, respondents Kaiser Foundation Hospital, South-

ern California Permanente Medical Group, and Kaiser Health Plan, Inc. respectfully assert that certiorari is inappropriate.[1]

Respondent Kaiser Foundation Hospital—Panorama City ("Respondent") is a private hospital that suspended, and then terminated, Petitioner from its medical staff due to Petitioner's significant deficiencies in clinical judgment and care. Pursuant to California law, Respondent provided Petitioner with a private, internal hearing and appeal to challenge the suspension and termination. After Petitioner lost the hearing and appeal, he filed a petition pursuant to California law to the California Superior Court. The Superior Court applied California law and upheld the termination. Petitioner appealed to the California Court of Appeal, which also applied California law and upheld the termination. The California Supreme Court denied his petition for review. Nothing in this process raised a federal issue.

Because Respondent's decision to terminate Petitioner's medical staff privileges and the state courts' findings upholding the termination do not raise any federal questions, Petitioner makes claims about the hearing process Respondent provided that are senseless and misleading. Petitioner's first such claim is that the process violated his federal due process rights. Each of the respondents is a private entity, not a state actor. Petitioner's federal due process claims are therefore invalid. Petitioner's second claim is that the private arbitrator was biased. This argument is based on false assertions regarding the arbitrator's appointment, and, again, does not raise a federal question. Finally, Petitioner claims that the California courts' rulings conflict with federal and state

---

[1] Although Petitioner identifies Kaiser Foundation Hospital, Southern California Permanente Medical Group, and Kaiser Health Plan, Inc. as Respondents, the only matter Petitioner addresses in his Petition for Certiorari is an action by Kaiser Foundation Hospital—Panorama City. Therefore, Southern California Permanente Medical Group and Kaiser Health Plan, Inc. are inappropriately identified as Respondents.

case law. Because the California courts reviewed a private entities' compliance with state law, and because the application of state law did not conflict with federal law, this argument also fails.

Ultimately, this case is about Petitioner's disappointment that the state courts' application of state law did not come out in his favor. His mere disappointment does not raise the issue to a federal question worthy of review by the United States Supreme Court.

JURISDICTION

Petitioner improperly asserts jurisdiction under United States Supreme Court Rules 10(b) and 10(c). Contrary to Petitioner's assertions, this case does not involve any federal Constitutional or statutory rights, and does not raise any federal questions or conflicts with state court rulings. Therefore, the United States Supreme Court does not have jurisdiction over this case.

STATEMENT OF THE CASE

I. STATE LAW GOVERNING HOSPITALS AND MEDICAL STAFF PEER REVIEW

To understand the factual and procedural history of this matter, it is important to understand California's hospital licensing and peer review laws. California hospital's are licensed under title 22 of the California Code of Regulations. Under California licensing law, final authority and responsibility for the conduct of an acute care hospital rests in the hospital's governing body, which is responsible for assuring that the medical staff establishes controls "designed to ensure the achievement and maintenance of high standards of professional ethical practices" at the hospital. Cal. Code Regs. tit. 22, § 70701(a)(7) (2005). California hospitals have "an organized medical staff responsible to the governing body for the adequacy and quality of the medical care rendered to

patients in the hospital." Cal. Code Regs. tit. 22 § 70703(a) (2005). In California, a physician may not practice at the hospital if he or she is not a member of the medical staff, and

> [m]embership on the medical staff . . . [must] be restricted to physicians . . . competent in their respective fields, worthy in character and in professional ethics.

Cal. Code Regs. tit. 22, § 70701(a)(1)(E) (2005).

Hospitals "insure the competence of [their] medical staff[s] through careful selection and periodic review," which is a "necessary predicate to delivering quality health care." *Bell v. Sharp Cabrillo Hosp.*, 212 Cal. App. 3d 1034, 1050-51 (1989). If a hospital does not adequately review the competence of practitioners to whom it grants privileges, that hospital is subject to liability to patients for the practitioners' negligence. *Elam v. College Park Hosp.*, 132 Cal. App. 3d 332, 346 (1982); *see Hongsathavij v. Queen of Angels Hollywood Presbyterian Med. Ctr.*, 62 Cal. App. 4th 1123, 1143 (1998).

The periodic review of medical staff members' clinical care is often referred to as "peer review" or "professional review." On occasion, peer review results in the hospital restricting or terminating the physician's privileges to practice at the hospital (also referred to as "adverse action"). California Business and Professions Code section 805 requires hospitals to report certain adverse actions to the Medical Board of California if the actions were based on quality of care concerns. Reportable adverse actions include summary suspensions of medical staff privileges lasting more than 14 days and the termination of medical staff membership or privileges. Cal. Bus. & Prof. Code § 805 (West 2005). Similar to the California reporting requirements, 42 U.S.C. § 11133 requires hospitals to report certain adverse actions to the National Practitioner Data Bank ("NPDB"). The NPDB is a databank that hospitals and other healthcare entities query prior to offering membership or employment to a physician.

If the hospital's medical staff recommends that the governing body take an adverse action that would, if adopted, result in a report to the Medical Board of California, the hospital is required under California Business and Professions Code sections 809 *et seq.* ("Section 809") to provide the physician with an internal, private hearing that meets the process requirements outlined in the statute. In most cases, the hospital must provide the hearing process prior to taking the adverse action; however, summary suspensions may be implemented before a hearing if (1) the physician poses an imminent danger to any person, and (2) the physician receives the hearing rights in Section 809 after the summary suspension's imposition. Cal. Bus. & Prof. Code § 809.5 (West 2004). Although Section 809 outlines the hearing's procedural requirements, the hearing is a private proceeding, provided by the hospital. Unlike California law, federal law does not require hospitals to provide any hearing rights to a physician when taking action that must be reported to the NPDB. *See*, 42 U.S.C. §§ 11111-12 (1995).

II. RESPONDENT'S ACTION AGAINST PETITIONER AND SUBSEQUENT HEARING

Respondent took adverse actions against Petitioner's medical staff privileges that required reports to the Medical Board of California and the NPDB, and resulted in a hearing that complied with Section 809.

Petitioner was a member of Respondent's Medical Staff from 1977 to 1998. In 1994, after numerous concerns surfaced regarding Petitioner's clinical care and judgment, the Medical Staff investigated Petitioner and ultimately determined that he posed an imminent danger to patients at the hospital. In August 1994, the Medical Staff's executive committee, known as the Medical Executive Committee ("MEC"), summarily suspended Petitioner, and recommended the termination of his medical staff privileges. Pursuant to Section

809, the MEC provided Petitioner with a hearing to address both the summary suspension and the recommendation to terminate privileges.

The hearing Petitioner received complied completely with California law. As required by Section 809, Petitioner received notice of the proposed adverse action, of the charges that formed the basis of the adverse action, of his hearing rights, and of the time, date, and location of the hearing. The hearing was before an arbitrator who was appointed by the mutual agreement of both parties after voir dire. During the hearing, both the MEC and Petitioner were provided with the same evidence submitted to the arbitrator; were permitted to call, examine, and cross-examine witnesses; presented and rebutted evidence; and submitted written statements at the hearing's close. *See*, Cal. Bus. & Prof. Code § 809.2 (West 2004). On December 15, 1997, the arbitrator issued a detailed decision that included findings of fact and a conclusion articulating the connection between the evidence produced at the hearing and the decision reached. The decision upheld 13 of the MEC's 16 charges against Petitioner, finding that the MEC sustained its burden of proof both on those charges and on the suspension and termination of Petitioner's privileges and membership.

Petitioner appealed the arbitrator's decision to a three member Appellate Review Panel ("ARP") appointed by the hospital, pursuant to California Business and Professions Code section 809.4 and the Medical Staff Bylaws. The ARP was advised by an attorney that had not previously been involved in the matter. On June 8, 1998, the ARP issued its findings and decision. It unanimously found that Petitioner received a full and fair hearing, consistent with fair process; that the MEC's recommendation and the arbitrator's decision to terminate Petitioner from the Medical Staff was reasonable and clearly warranted; that the MEC's charges and arbitrator's decision were supported by a preponderance of the

evidence; that Petitioner failed to adhere to the Respondent's policies and procedures and standards of care; and that the preponderance of the evidence supported the summary suspension and termination of Petitioner's privileges. Consistent with the arbitrator's and ARP's decisions, the Respondent's Board of Directors terminated Petitioner's Medical Staff membership and privileges.

III. STATE COURT PROCEEDINGS

After being terminated, Petitioner filed a petition for writ of administrative mandamus to the California Superior Court pursuant to California Code of Civil Procedure section 1094.5 ("Section 1094.5").[2] Under Section 1094.5, the Superior Court does not perform a *de novo* review of the proceedings, but rather, reviews the record of the hospital hearing to determine whether it complied with Section 809 and whether the record demonstrates that the hospital's action was supported by substantial evidence. Cal. Code Civ. Pro. § 1094.5(c) (West 1980 Supp. 2005). The Superior Court found that the hearing complied with Section 809, and that the record demonstrated that the hospital's action was supported by substantial evidence.

Petitioner appealed the Superior Court's decision to the California Court of Appeal. Under Section 1094.5, the Court of Appeal, like the Superior Court, reviews the hospital's hearing to determine whether it complied with Section 809 and whether the record demonstrates that the hospital's action was supported by substantial evidence. *Id.* The Court of Appeal also found that the hearing complied with Section 809, and that the record demonstrated that the hospital's action was supported by substantial evidence.

---

[2] Although Respondent is a private entity, not an administrative agency, California statutory law provides for court review of a hospital's hearing process through a writ of administrative mandamus.

Petitioner filed for review in the California Supreme Court. The California Supreme Court denied Petitioner's petition.

ARGUMENT

IV. PETITIONER FAILS TO RAISE A FEDERAL QUESTION FOR REVIEW

Petitioner's assertion of jurisdiction in this matter fails because he does not raise any federal question for review. A private hospital's decision to terminate a physician's medical staff privileges and membership on the basis of his substandard clinical care and judgment does not raise any of the jurisdictional mandates set forth in 28 U.S.C. § 1257. This is apparent from a plain reading of 28 U.S.C. § 1257:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a) (1993).

Petitioner is appealing the state court's application of state law to a private hospital's peer review decision. No federal issue is raised; therefore, Petitioner's petition for certiorari should be denied.

A. The Due Process Clause Of The Constitution Is Inapplicable

Petitioner argues that the hearing process he received at the hospital violated federal Due Process rights, as described in Article XIV, Section 1 of the Constitution. It is axiomatic

that in order to establish a Due Process claim, a party must allege that his or her Constitutional rights were infringed upon as a result of "State Action." The Fourteenth Amendment's guarantee of Due Process applies to Petitioner's claim only if he can show that the Respondent's adverse actions against Petitioner's medical staff membership were tantamount to action by the State of California. *Blum v. Yaretsky*, 457 U.S. 991 (1982). Petitioner has not demonstrated any nexus between the private Respondent's action and the state that would justify attributing the Respondent's actions to the state. His references to the California and federal laws that require Respondent to report adverse privilege decisions to the government do not meet the standards for invoking Fourteenth Amendment protections.

This Court reiterated the rational for Constitutional State Action analysis in *Blum v. Yaretsky*:

> The Fourteenth Amendment . . . provides in part that '[n]o State shall . . . deprive any person of life, liberty, or property without due process of law.' Since this Court's decision in the Civil Rights cases . . . 'the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States.' 'That amendment erects no shield against merely private conduct, however discriminatory or wrongful.' 457 U.S. 1002-03 (citations omitted).

In *Blum*, this Court held that private nursing homes' decisions to transfer patients without notice or an opportunity to be heard did not constitute State Action. *Id.* at 1012. In so holding, the Court rejected the Medicaid patients' claim that the actions constituted State Action because the State had mandated that the private nursing homes periodically assess what level of care the patients required and adjusted the amount of state payments for the services based upon the nursing homes' decisions. *Id.* at. 993-96.

The plaintiffs in *Blum* alleged that the nursing home procedures and the state process did not give them adequate notice of the nursing homes' decisions or of their right to an administrative hearing, in violation of their rights under the Due Process clause of the Fourteenth Amendment. *Id.* The Supreme Court found that the plaintiffs had failed to establish "State Action" in the nursing homes' decisions to transfer or discharge patients because "[t]hose decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." *Id.* at 1008. The Court noted, "'[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the state for purposes of the Fourteenth Amendment.'" *Id.* at 1004 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974)). The Court held that "[t]he complaining party must show that 'there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as the action of the State itself.'" *Id.* (quoting *Jackson*, 419 U.S. at 351). The Court concluded that "[t]he purpose of this requirement is to assure that Constitutional standards are invoked only when it can be said that the State is *responsible for* the specific conduct of which the plaintiff complains." *Id.* at 1004 (emphasis in original).

Like that of the plaintiffs in *Blum*, Petitioner's claim of State Action must also fail. Petitioner has not sued California, but rather a private hospital. Petitioner does not, and cannot, allege that the State was directly or indirectly involved in any aspect of the decision to terminate Petitioner's staff privileges. Since the Supreme Court's decision in *Blum*, the United States Courts of Appeals overwhelmingly have held that a private hospital's termination of a physician's privileges does not constitute "State Action," even in cases where plaintiffs alleged that the hospital is subject to state regulations and rules or receives significant public funding. *Wong v. Stripling*, 881 F.2d 200 (5th Cir. 1989)

(establishing that merely because a state statutory scheme allows hospitals to suspend, revoke, or restrict a physician's hospital staff privileges, a hospital's decision to suspend, revoke, or restrict privileges does not constitute "state action" under 42 U.S.C. § 1983); *Pariser v. Christian Health Care Sys., Inc.*, 816 F.2d 1248 (8th Cir. 1987) (holding that a private hospital's receipt of public funds and tax benefits; submission to pervasive regulation, and performance of a public function did not raise the hospital's suspension of a physician's admitting privileges to a state action); *Ezpeleta v. Sisters of Mercy Health Corp.* 800 F.2d 119 (7th Cir. 1986) (holding that the decision to terminate staff privileges at a private hospital cannot be fairly attributed to the state under the due process clause, even when made within the context of the statutorily mandated peer medical review process).

Carter v. Norfolk Cmty. Hosp. Assoc., 761 F.2d 970 (4th Cir. 1985) (finding that a private hospital's receipt of federal funds, submission to state regulations, and compliance with state encouragement to curb Medicare and Medicare abuses did not transform the hospital's action terminating a physician into state action under the due process clause); *Crowder v. J. K. Conlan*, 740 F.2d 447 (6th Cir. 1984) (finding that merely because a hospital receives considerable government funding, is subject to extensive state regulation, has two public officials serving on its board of trustees, and had been purchased by the county and then leased back to the board of trustees pursuant to a state statute, neither the state nor county was involved in the hospital's daily operation or retained coercive control over the hospital; therefore, the restriction of a physician's privileges did not involve state action under 42 U.S.C. § 1983); *Mendez v. Belton*, 739 F.2d 15 (1st Cir. 1984) (holding that being subject to extensive state regulation and receiving federal funds does not change a private hospital's decision regarding a physician's privileges into state action under 42 U.S.C. § 1983 and the due process clause); *Loh-Seng Yo, M.D. v. Cibola Gen. Hosp.*, 706 F.2d 306 (10th Cir.

1983) (holding that an adverse action against a physician's privileges by a private hospital that received Medicare and Medicaid payments and construction funding under federal law, submitted to extensive state and federal regulations, and maintained a localized geographic monopoly, did not give rise to state action where the plaintiff makes no allegation that the state was involved in any significant manner in the adverse action).

See also Hodge v. Paoli Mem'l Hosp., 576 F.2d 563 (3d Cir. 1978) (holding that private hospital's decision to terminate staff privileges did not constitute state action, despite hospital's receipt of federal funds and tax exemption, as well as begin subject to state licensing requirements). *But cf. Lowe v. Scott*, 959 F.2d 323 (1st Cir. 1992) (finding that where state law creates a property interest in hospital privileges, all physicians are entitled to due process in decisions affecting hospital decisions).

Goss v. Memorial Hospital System, 789 F.2d 353 (5th Cir. 1986) is typical of the appellate courts' reasoning in private hospital adverse action cases. In *Goss*, a physician whose medical staff privileges were suspended brought action against the hospital under 42 U.S.C. § 1983, claiming that the hospital's conduct denied him procedural Due Process. *Id.* at 354. The *Goss* plaintiff's theory was that the hospital acted under color of state law when it expelled him from the Medical Staff under the authority of the Texas Medical Practice Act. *Id.* at 356. This act, much like California law, required review of physicians' qualifications for staff privileges and authorized a medical peer review committee to report its findings to the Texas State Board of Medical Examiners. It also provided immunity from liability for peer review committee members, as does California law. *See Cal. Civil Code* §§ 43.7, 43.8. (West 1990 Supp. 2005).

The United States Court of Appeals for the Fifth Circuit held that the hospital's peer review actions did not constitute

State Action. In order to be considered State Action, the court held that there would have to exist a "nexus" between the acts of the peer review committee members and the state "such that appellees' conduct is "fairly attributable to the state."" *Goss*, 789 F.2d at 356 (quoting *Rendell-Baker v. Cohn*, 457 U.S. 830, 838 (1982)). In order to be so attributable, the state must have "exercised coercive power or [have] provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state." *Id.* (quoting *Rendell-Baker*, 457 U.S. at 840 (citations omitted)).

The actions of Respondent herein likewise are not "fairly attributable to the state," nor is there any exercise of "coercive power" or "significant encouragement" sufficient to qualify Respondent's actions against Petitioner as State Action. *Id.* Respondent, not the state, terminated Petitioner's medical staff membership and provided him with an internal, private hearing. Petitioner's citation to the requirement that Respondent report adverse actions to the California Medical Board and the NPDB does not transform the Respondent's action into state action. *See Goss v. Mem'l Hosp. Sys.*, 789 F.2d 353 (5th Cir. 1986). In *Blum*, plaintiffs argued that the private nursing home's decisions to transfer patients to a different level of care involved state action because state authorities "responded" to the challenged transfers by adjusting the patients' Medicaid benefits. *Blum*, 457 U.S. at 820. This Court held that:

> our precedents indicate that a State normally can be held responsible for a private decision only when it has exercised *coercive power* or has provided such *significant encouragement*, either overt or covert, that the choice must in law be deemed to be that of the State. Mere approval of or acquiescence in the initiative of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the

Fourteenth Amendment. *Id.* at 1004-05 (emphasis added) (citations omitted).

Like the state agencies in *Blum* responsible for Medicaid administration, California physician licensing authorities *respond* to the action of the private entity, the hospital. State and federal law requires hospitals to make reports of actions *already taken*. It does not dictate the actions themselves. Petitioner is neither challenging the state and federal reporting statutes, nor asserting that any of the respondents violated the reporting statutes in this instance. Instead, he objects only to Respondent's decision that led to its statutory obligation to report. Thus, as in *Blum*, the fact that the state responds to the hospital's adverse actions by requiring it to report those actions does not make the state responsible for the hospital's decision.

Because Petitioner makes no challenge to California or federal law, and never alleges state action, his Due Process claim must fail.

B. No Federal Statute Is At Issue

Petitioner briefly cites the Federal Health Care Quality Improvement Act ("HCQIA"), codified at 42 U.S.C. § 11101, to argue that federal law elucidates physicians' rights and requires "impartial adjudicators and fair procedure in accordance with due process for hearings regarding the revocation of hospital privileges." (Petition for Certiorari, p. 7.) Contrary to Petitioner's statement, HCQIA does not grant federal hearing rights to physicians, but rather provides immunity to hospitals who perform appropriate peer review. Consequently, Petitioner fails to raise a federal question through his citation to HCQIA.

According to the Congressional findings detailed in 42 U.S.C. § 11101, HCQIA was enacted to provide incentives and protections for individuals and entities participating in peer review. Under 42 U.S.C. § 11111 and § 11112, if a pro-

fessional review body (for example, a hospital medical staff), complies with the peer review process outlined in § 11112, then the professional review body is immune from all federal liability (except for certain civil rights violations) that might arise from the peer review action. Section 11111(a) provides:

> If a professional review action . . . of a professional review body meets all the standards specified in section 11112(a) of this title . . .
>
> (A) the professional review body, ...
>
> shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action.

HCQIA does not require hospitals to provide a process that complies with § 11112; nor does HCQIA guarantee physicians the hearing procedures outlined in § 11112. The processes are purely optional—if the hospital does not desire to have the federal immunity the statute provides, it can ignore all of the processes outlined in § 11112.

The argument that HCQIA confers hearing rights to physicians has been soundly rejected by the three federal circuits which have addressed the question. In *Wayne v. Genesis Medical Center*, the Eighth Circuit Court of Appeals held that HCQIA's express language makes clear that no cause of action exists for physicians who claim that a hospital failed to follow HCQIA's peer review process. 140 F.3d 1145, 1147-48 (8th Cir. 1998). The Tenth Circuit in *Hancock v. Blue Cross-Blue Shield, Inc.*, 21 F.3d 373 (10th Cir. 1994) and the Eleventh Circuit in *Bok v. Mutual Assurance, Inc.* 119 F.3d 927 (11th Cir. 1997), made similar findings.

In his Petition, Petitioner does not challenge the validity of HCQIA, nor does he challenge California law in relation to HCQIA. Instead, he makes an empty claim that HCQIA grants him federal rights. The plain meaning of the statute and federal case law establish that Petitioner's claim is meritless.

C. The Cases Petitioner Cites Regarding Judicial Bias Are Inapplicable

Petitioner cites numerous inapposite cases in his argument that the arbitrator at the private hospital hearing was presumed to be biased because Respondent paid the arbitrator's fee. Each of the federal cases Petitioner cites involves some sort of government entity or fact-finder—whether it be a judge, mayor, or agency—that had a pecuniary interest in the outcome of the matter.[3] The holdings in these cases depend on a combination of the state action (thus raising Due Process claims) and the actual pecuniary interest of the judge, mayor, or agency in the outcome of the matter. In contrast, the present matter does not involve state action (and therefore does not raise a Due Process claim), and the arbitrator received no pecuniary interest dependent on the outcome of the matter.[4]

Petitioner's citations therefore are inapposite. In *Tumey v. Ohio*, 273 U.S. 510 (1927), the mayor who adjudicated a criminal case received fees and costs only if the defendant was convicted. The Supreme Court found a system that incentivized the mayor to convict defendants to violate Due Process. *Id.* at 532. In *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972), the mayor was responsible for village finances, and also maintained judicial power. Although the mayor was not paid directly for convictions, the village that he financially administered directly benefited from the imposition of fines from criminal convictions. The Supreme Court found this to be a conflict violating the defendant's Due Process rights. *Id.* at 57-60. In *Brown v. Vance*, the Fifth Circuit Court of Appeals found that in a system where a judge's compensation depended on the number of cases filed

---

[3] Respondent will address the state cases Petitioner cites in Section V below.

[4] The arbitrator was paid for the services provided, independent of outcome.

in his or her court, judges would be encouraged to convict defendants or rule in favor of civil plaintiffs in order to garner favor with the police and civil attorneys who unilaterally determined with which judge they would file their cases. 637 F.2d 272, 285-86 (5th Cir. 1981). That system thus violated both criminal and civil defendants' Due Process rights. *Id.* at 283-85.

In *Gibson v. Barryhill*, 411 U.S. 564 (1973), the Alabama Board of Optometry—a state agency—consisted of members in direct financial competition with optometrists charged with unprofessional conduct. The Board also was litigating a matter against those optometrists and their employer. This Court upheld the District Court's finding that because the Board was composed solely of practitioners in competition with the charged optometrists, the Board members' pecuniary interest disqualified them. *Id.* at 578-79. In *Aetna Life Insurance Company v. Lavoie*, an Alabama Supreme Court judge cast the deciding vote in a case whose outcome could directly affect a similar lawsuit in which he was a plaintiff. 475 U.S. 813, 821-25 (1986). In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), a judge ruled in a case that would financially benefit a hospital on whose board he sat. Finally, in *Withrow v. Larkin*, 421 U.S. 35 (1975) and *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Supreme Court ruled that certain *state action* (in *Withrow*, action by the Wisconsin Medical Examining Board, and in *Goldberg*, action by welfare board) required due process. The Court made no ruling regarding bias of the fact finder in those cases.

None of these cases cited by Petitioner are relevant here. First, no state action is alleged by Petitioner—the action was taken by a private entity after a hearing in front of a private arbitrator. Therefore, cases that address Due Process are inapplicable. Second, the compensation for the mutually selected arbitrator did not depend on the outcome of the

hearing. Once again, Petitioner fails to raise a legitimate federal question.

V. THE STATE COURTS' DECISIONS ARE CONSISTENT WITH STATE LAW

Petitioner argues that the state courts' decisions that address the selection of the arbitrator for the medical staff hearing conflict with California case law. Because a state court's application of state case law to a private entity does not raise a federal issue, it is not appropriate for Supreme Court review.

Moreover, Petitioner's analysis of the courts' application of state case law is erroneous. Petitioner's discussion is based on the fallacy that Respondent "chose" the hearing officer. The record below is clear that, as required by state law, the MEC and Petitioner selected the arbitrator by a process "mutually acceptable to both parties." Cal. Bus. & Prof. Code § 809.2(a) (West 2003). The evidence from the administrative record presented to the California Superior Court and the California Court of Appeal establishes that the arbitrator was appointed only after both parties participated in voir dire and neither party objected to his appointment. Petitioner cannot truthfully deny this fact.

Petitioner's analysis of *Haas v. County of San Bernardino* 27 Cal. 4th 1017 (2002) and *Yaqub v. Salinas Valley Memorial Healthcare System* 122 Cal. App. 4th 474 (2004) is therefore inapposite. In *Haas*, San Bernardino County, a state actor, unilaterally selected a hearing officer over Mr. Haas's objections.[5] *Haas*, 27 Cal. 4th at 1021. In its opinion, the

---

[5] Petitioner failed to cite *Haas* in his briefs to the California Court of Appeal. He provides no explanation as to why he decided not to cite this case, which the California Supreme Court decided in 2002, to the lower court. Moreover, in his Court of Appeal brief, Petitioner did not fully brief his argument regarding alleged arbitrator bias, spending less than 50 words on the argument and failing to cite any of the federal cases dis-

California Supreme Court emphasized that the County's unilateral and at-will selection of hearing officers raised a concern regarding the appearance of bias. *Id.* The County also paid the hearing officer's fee in its entirety, which compounded the selection concern. *Id.* The Court specifically noted that *even if the fee had been split, the unilateral selection by the County was a significant enough concern to raise the appearance of bias.* *Id.* at 1030-31. In other words, unilateral selection, not payment, was the deciding factor in the decision.

As in *Haas*, the California Court of Appeal in *Yaqub* decried the hospital's unilateral appointment of a hearing officer as violating California's laws regarding hospital peer review actions.[6] *Yaqub*, 122 Cal. App. 4th, at 485-86. As a secondary matter, the Court also observed that the hospital paid the hearing officer's fee. *Id.* at 484. Notably, like Mr. Haas, Dr. Yaqub objected to the appointment of the hearing officer at the outset of the hearing. *Id.* at 481.

The facts in the instant matter are significantly different from *Haas* and *Yaqub*. In direct contrast to those cases, Respondent did not unilaterally select the arbitrator—Respondent and Petitioner mutually agreed to the arbitrator after voir dire. Further, Petitioner *never objected to the selection of the arbitrator, or that Respondent paid the*

---

cussed in Section IV.C above. Respondents therefore respectfully request that this issue be considered waived.

[6] *Yaqub* became final after the Court of Appeal denied Petitioner's writ of mandate petition on December 1, 2004. *Yaqub* was decided on September 16, 2004, and appealed to the California Supreme Court on October 26, 2004. The California Supreme Court denied review on January 12, 2005. Pursuant to California Rules of Court Rule 29.4, the Court of Appeals decision in *Yaqub* did not become final until the California Supreme Court denied review. Therefore, under California law, Petitioner could not rely on *Yaqub* in his argument before the Court of Appeal, and the Court of Appeal appropriately did not consider that case.

arbitrator's fee, until after he had lost the arbitration. Had Petitioner truly believed that the selection and payment was procedurally unfair, he should have voiced his concerns before the conclusion of an arbitration that took over two and half years and 32 sessions to complete. His failure to do so should result in his argument being waived.

Respondents know of no California law that prohibits a private party from paying a *mutually* selected arbitrator when the other party never objects or offers to share the payment. Because the fundamental facts in this matter are significantly different from those in the *Haas* and *Yaqub* decisions, the California Court of Appeal applied state law correctly and rejected Petitioner's arguments.

CONCLUSION

On the basis of the foregoing, Respondents respectfully urge this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

TAMI S. SAYASON
LOWELL C. BROWN
SARAH G. BENATOR
FOLEY & LARDNER LLP
2029 Century Park East
Suite 3500
Los Angeles, California 90067
(310) 277-2223

* Counsel of Record — *Attorneys for Respondents*

The two other California cases Petitioner cites also are irrelevant. *Hurtado v. Statewide Home Loan Comp.*, 167 Cal. App. 3d 1019 (1985) does not address the selection of judges or arbitrators at all. *Engalla v. Permanente Medical Group, Inc.*, 15 Cal. 4th 951 (1997) discusses the manner in which a medical group applied a private arbitration agreement in a medical malpractice case, and does not address the selection of arbitrators in peer review cases.

Supreme Court, U.S.
FILED
AUG - 8 2005
OFFICE OF THE CLERK

No. 04-1536

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT J. JAFFE, M.D.,

Petitioner,

vs.

KAISER FOUNDATION HOSPITAL, *et al.*,

Respondents.

On Petition For Writ of Certiorari
To the California Court of Appeal
Second Appellate District

PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT J. JAFFE, M.D.
22141 Burbank Boulevard, #5
Woodland Hills, CA 91367
Telephone: (818) 713-1378

Petitioner in Pro Se

QUESTION PRESENTED FOR REVIEW

May state courts allow the use of adjudicators who have a direct, personal, substantial, pecuniary interest in a proceeding affecting a physician's right to practice his profession, despite Federal law and U.S. Supreme Court precedent that hold such financial interest violates physicians' rights to an impartial adjudicator, and is therefore repugnant to the Constitution of the United States, that guarantees due process and fair procedure?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

ROBERT J. JAFFE, M.D., Petitioner in pro se

KAISER FOUNDATION HOSPITAL, SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, KAISER HEALTH PLAN, INC., Respondents.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW.....i
PARTIES TO THE PROCEEDING..... ii
TABLE OF CONTENTS.....iii
INTRODUCTION..... 1
STATE COURTS' STANDARD OF REVIEW..... 1
JURISDICTION.....1

I. The U.S. Supreme Court Has Jurisdiction Where State Law as Applied Violates Foundational Principles of the United States Constitution.....1

(a) Peer Review is a State Action.....1

(b) Hospital Privileges are a Property Right..... 4

II. A Federal Statute is at Issue.....5

III. The Cases Petitioner Cited Regarding Presumed Bias of an Adjudicator with a Pecuniary Interest are Directly Applicable.....6

IV. Federal Law and U.S. Supreme Court Precedent Conflict With the State Courts' Decisions in This Case....7

V. Petitioner's Request for Relief from Hospital Peer Review Action is Reasonable and Based Upon Facts.....8

CONCLUSION.....10

TABLE OF AUTHORITIES

CASES

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 [106 S.Ct. at pp. 1586-1587].....6
Board of Regents v. Roth, 408 U.S. 564 1972)..... 4
Brown v. Vance (5th Cir. 1981) 637 F.2d 272, 276..... 8

TABLE OF AUTHORITIES – Continued Page

Burton v. Wilmington Parking Authority
365 U.S. 715, 725 (1961).....3
Connally v. Georgia (1977), 249
[97 S.Ct. 546, 548, 50 L.Ed.2d 444].....6
Ezpeleta v. Sisters of Mercy Health Corp.
800 F.2d 119 (7th Cir. 1986)..... 4
Gibson v. Berryhill, 411 U.S. at p. 579
[93 S.Ct. at p. 1698] 7
Goldberg v. Kelly, 397 U.S. 254, 267.....5, 6
Haas v. County of San Bernardino,
27 Cal.4th at 1025..... 6, 7, 8 10
Jackson v. Metropolitan Edison Co. 419
U.S. 345 350 (1974).....3
Lowe v. Scott, 959 F.2d 323 (1st. Cir. 1992..... 4
Lugar v. Edmonson Oil Co., 457 U.S. 922
[102 S.Ct. at 2753-54] 2
Mathews v. Eldrige,724 U.S. 319 (1976).....5
Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).....3
Tumey v. Ohio (1927) 273 U.S. 510, 523
[47 S.Ct. 437, 441, 71 L.Ed. 749] 6, 7
Ward v. Village of Monroeville, 409 U.S. 57, 60
[93 S.Ct. 80, 83])..... 6, 7
Withrow v. Larkin, 421 U.S. 35 (1975)..... 7
Yaqub v. Valley Memorial Healthcare System
122 Cal.App.4th (2004).....7, 8

STATUTES

42 U.S.C. § 11112.....5
Cal. Code Civ. Proc. § 1094.5(b).....1
Cal. Bus. & Prof. Code § 809(a)(5) and (6).....2
Cal. Bus. & Prof. Code § 809, et seq..... 2, 3, 4

MISCELLANEOUS

Fourteenth Amendment U.S. Constitution.....1, 2
Holmes, The Common Law (1881) p. 3.....10

INTRODUCTION

The single issue brought before this court is whether state courts may allow the use of adjudicators who have a direct, personal, substantial, and pecuniary interest in a proceeding affecting a physician's right to practice his profession, despite Federal law and U.S. Supreme Court precedent that hold such financial interest violates physicians' rights to an impartial adjudicator, and is therefore repugnant to the Constitution of the United States that guarantees due process and fair procedure? Respondents' Brief in Opposition to Petitioner's Writ of Certiorari (page i) asks three different questions, all of which confuse rather than clarify the issue Petitioner brings before this court.

Petitioner asks whether the Due Process clause of the United States Constitution bars State laws that permit overtly biased adjudicators to rule in matters affecting the deprivation of a property right.

STATE COURTS' STANDARD OF REVIEW

Respondents (pages 7-8) omit that Cal. Code Civ. Proc. § 1094.5(b) requires the courts to also review questions of *fair procedure.*

JURISDICTION

I. The U.S. Supreme Court Has Jurisdiction Where State Law as Applied Violates Foundational Principles of the United States Constitution.

(a) Peer Review is a State Action.

Respondents argue that the hearing they afforded Petitioner did not violate the due process clause of the Fourteenth Amendment because Petitioner's rights were not infringed upon as the result of a "state action". Respondents (pages 8-14) cite inapplicable cases in an effort to deny the obvious fact that physician peer review and peer review hearings are the result of state action. Notably, every case Respondents cite *predates* 1989.

In 1989 the State of California designed a peer review system of its own, setting forth a detailed regulatory scheme governing peer review activity, and thereby *delegated the state's responsibility for peer review* to the private sector. ". . . to *aid the state licensing boards* in *their responsibility* to regulate and discipline errant healing arts practitioners. . . it is the policy of the State of California through the *peer review system as provided for by California law. . .*" Cal. Bus. & Prof. Code § 809(a)(5) and (6)[1]. (Emphasis added).

State statutes (*809, et seq.*) dictate the time, place and manner of any peer review Hearing. State law explicitly requires that any such Hearing comport with the minimum standards of due process and fair procedure. State law requires physicians to seek review of adverse peer review decisions in state courts. These factors establish that the actions of the hospital are the actions of the state.

The threshold inquiry in any case involving a private entity accused of violating a person's constitutional rights under the Fourteenth Amendment is whether that private entity may be regarded as a state actor.

Lugar v. Edmonson Oil Co., 457 U.S. 922 [102 S.Ct. at 2753-54] states the criteria for state action as:

> "First, the deprivation must be caused by the exercise of some right or privilege *created by the State* or by a rule of conduct *imposed by the state* or by *a person for whom the State is responsible*. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a *state actor*. This may be because he is a state official, *because he has acted together with* or has obtained significant aid from state officials, or because his conduct is *otherwise chargeable to the state*." (Emphasis added.)

---

[1] Cal. Bus. & Prof. Code § 809, is hereafter referred to as *809, et seq.*

These criteria are present in Petitioner's case, as shown above.

The dispositive question in any state-action case is not whether *any single fact* or relationship presents a sufficient degree of state involvement, but rather whether the *aggregate of all relevant factors* compels a finding of state responsibility. (*Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972)).

Respondents cite *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 350 (1974), in which the court found no state action on the part of an electric utility company that denied services without due process. The facts are inapplicable to the instant matter. But the principle was directly addressed by Justice Marshall in his dissent:

> "*But* when the activity in question is of such public importance that the *State* invariably either provides the service itself *or permits private companies to act as state surrogates in providing it*, much more is involved than just a matter of public interest. In those cases, the State has determined that *if private companies wish to enter the field, they will have to surrender many of the prerogatives normally associated with private enterprise and behave in many ways like a governmental body*. And when the *State's regulatory scheme has gone that far*, it seems entirely consistent to impose on the public utility the *constitutional burdens normally reserved for the State*." (Emphasis added.) *Jackson, supra*, 419 U.S. 345 372 (Justice Marshall, dissenting) (1974).

The criteria Justice Marshall identifies as indicating state action are indeed present in the instant case. The State delegated its responsibility for peer review to the private sector and required strict adherence to the state's regulatory scheme (*809, et seq.*) Likewise, in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), the court found the existence of state action in circumstances where "the State has sufficiently

insinuated itself into a position of *interdependence* with [the company] that it must be recognized as a joint participant in the challenged activity."

Respondents (page 11) misquoted *Ezpeleta v. Sisters of Mercy Health Corp.* 800 F.2d 119 (7th Cir. 1986). Respondents claim the court held, "the decision to terminate staff privileges at a private hospital cannot be fairly attributed to the state under the due process clause, even when made within the context of the statutorily-mandated peer medical review." Respondents omit that the court went on to state "...*Unless* the regulation *includes specific criteria for guidelines as to what action must be taken and when.*" *Ezpeleta, supra,* 800 F.2d 119 (7th Cir. 1986) (emphasis added). In the instant case, the state's regulation (*809, et seq.*) does include specific regulatory guidelines as to what action must be taken and when. Therefore, according to all the above-stated case law, state action is present in this case.

(b) Hospital Privileges are a Property Right.

By affirming a hospital's improper adjudication, the highest court of the state has denied Petitioner his right to the due process required under the U.S. Constitution. *See, e.g., Lowe v. Scott,* 959 F.2d 323 (1st. Cir. 1992) (where *state law creates a property interest in hospital privileges,* all physicians are *entitled to due process in decisions affecting hospital decisions*). *See also Lowe, supra* at 323 stating, "when a public hospital grants a physician hospital privileges, and *undertakes explicitly or implicitly not to revoke these privileges without appropriate process, a protected property interest is created.*" "The *already-licensed,* have a vested property interest in the license, which forecloses denial without due process." *Lowe, supra* at 323. (Emphasis added.) *See also Board of Regents v. Roth,* 408 U.S. 564 (1972).

Supreme Court precedent holds that property and liberty interests require the due process rights under the Constitution. In *Board of Regents, supra* a professor *without tenure* was not

rehired at the end of his one-year contract. The Court held that the particular interest at hand was neither a property nor liberty interest because of the lack of tenure. In Petitioner's case, there is a clear property interest insofar as Petitioner was already licensed and tenured, and both the State (through *809, et seq.*) and Respondents' Hospital Bylaws explicitly preclude revocation of Hospital privileges without due process. Petitioner also had a liberty interest insofar as Respondent's actions seriously damaged his professional reputation and compromised his *future* employment prospects because of the required reporting to state and federal data banks and the required disclosure on all future hospital and staff employment applications. Thus, Petitioner has raised recognized federal questions for review.

II. A Federal Statute is at Issue.

Respondents (pages 14-15) state, "Petitioner has cited no *federal statute* to argue that federal law elucidates physicians' rights and requires "impartial adjudicators and fair procedure in accordance with due process for hearings regarding termination of hospital privileges." Respondents have overlooked Petitioner's Writ, p. 3:

"The rights of physicians are elucidated in federal law, as in *42 U.S.C. § 11112, et seq*. Such protections comport with numerous Supreme Court decisional precedents, which require a fair hearing with the rudiments of due process whenever individuals face loss of a substantial right. *Mathews v. Eldrige* 724 U.S. 319 (1976); see *also Goldberg v. Kelly*, 397 U.S. 254, 267 (administrative hearings demand rudimentary due process, and an 'impartial decisionmaker is essential.')" (Emphasis added.)

Respondents (page 15) claim, "the provisions of 42 U.S.C. § 11112 are purely *optional*", that "if a hospital does not *desire federal immunity,* the statute provides it can *ignore* all of the processes outlined in § 11112." This is false. First, Section 11112(b) gives *only the physician* the right to waive the fair hearing requirements; second, the statute's plain meaning is that (1) fair procedure be afforded; and (2) that hospitals be granted

immunity if they follow fair procedure. For any hospital to interpret the statute as meaning that it can deliberately ignore the fair hearing requirements of § 11112 if it does not *desire federal immunity*, is an extremely bad faith *misinterpretation* of the statute. The U.S. Constitution does not grant the option to ignore due process, nor does the U.S. Supreme Court. "Speaking of administrative hearings, and articulating the procedural requirements '*demanded by rudimentary due process*' in that setting, the [United States Supreme Court] has said that, 'of course, an impartial decision maker is essential.'" (*Haas v. County of San Bernardino*, 27 Cal.4th at 1025, quoting *Goldberg, supra.*")

III. The Cases Petitioner Cited Regarding Presumed Bias of Adjudicator with a Pecuniary Interest are Directly Applicable.

Respondents claim the cases presented by Petitioner are not on point because the holdings depend on a *combination of state action* and that the pecuniary interest received must be dependent on the "*outcome*" of the matter. This analysis is incorrect.

The high court has repeatedly and unambiguously held that courts, when faced with a claim of bias arising from financial interest, do *not* require proof of a direct pecuniary interest in the "*outcome*" of a particular case, or proof of *actual* judicial prejudice, nor do they decide whether the adjudicator was in fact influenced. The standard continues instead to be that set out in *Tumey v. Ohio* (1927) 273 U.S. 510, 523 [47 S.Ct. 437, 441, 71 L.Ed. 749] and *Ward v. Village of Monroeville*, 409 U.S. 57, 60 [93 S.Ct. 80, 83]), namely whether a fee system presents a 'possible temptation to the average man as judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused.' (Emphasis added.) *See also Aetna, supra,* 475 U.S. at pp. 824-825 [106 S.Ct. at pp. 1586-1587] and *Connally v. Georgia* (1977), 249 [97 S.Ct. 546, 548, 50 L.Ed.2d 444].

The rule disqualifying adjudicators with pecuniary interests applies with full force to administrative hearings. In this context, the court has applied the same rules to *administrative hearing officers and judges alike*. *Gibson v. Berryhill*, *supra*, 411 U.S. at p. 579 [93 S.Ct. at p. 1698].) The high court has written: "It is [Page 27 Cal.4th 1027] sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes." (*Gibson, supra*, 411 U.S. 564, 57. An adjudicator with a financial interest in a proceeding presents a "situation[] . . . in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35 (1975).

The high court requires disqualification of adjudicators only for financial interests that it has characterized as "direct, personal, substantial, [and] pecuniary" rather than "slight." (*Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825-826, quoting *Ward, supra*, 409 U.S. 57, 60 and *Tumey, supra*, 273 U.S. 510, 523.)

IV. Federal Law and U.S. Supreme Court Precedent Conflict With the State Courts' Decisions in this Case.

The California Superior Court and Appellate Court held that Petitioner must prove *"actual"* bias and pecuniary interest based on the *"outcome"* of the hearing in order to prevail on an allegation of financial interest in violation of due process. However, this holding, as shown above, is in direct conflict with the above-cited U.S. Supreme Court precedent cases.

Furthermore, this holding is in direct conflict with the Sixth District California Court of Appeal's recent holding in *Yaqub v. Valley Memorial Healthcare System*, 122 Cal.App.4th at 485 (2004). *Yaqub* [2], applying the principals of *Tumey, Ward* and

[2] Contrary to Respondents' claim that the *Appellate Court* properly ignored *Yaqub* because *Yaqub* was not final until the California Supreme Court denied review, it should be noted that *Yaqub* cited and relied on principals from well-established law, *Haas, Tumey* and *Ward*, all of

Haas, correctly held that no evidence of "actual prejudice" or of a direct financial interest in the "outcome" of a case is required for a showing of a financial interest in violation of due process.

Respondents' claim (page 19) that in *Yaqub* and *Haas,* "unilateral selection, not payment, was the deciding factor" is false. *Haas* states: "The practice of selecting temporary administrative hearing officers on an ad hoc basis and paying them according to the duration or amount of work performed" did not satisfy the requirements of due process . . ." And *Yaqub* quoting *Haas, supra* at 1017, states: "The Court's inquiry is not whether a particular man has succumbed to temptation, but whether the economic realities make the design of the fee system vulnerable to a 'possible temptation' to the 'average man' as judge.'"

In the instant case, in *addition* to the fact that Respondents paid the Arbitrator's fee 100 percent for the entire 32 session-hearing spanning 2 1/2 years, *making the Arbitrator's financial interest "direct, substantial and pecuniary"*, Respondents had chosen an Arbitrator (Daniel Willick) whose career specialty was that of an attorney who represents hospitals in peer review hearings. (See Petitioner's Writ of Certiorari p. 14 and Appendix A-35-A-46.) This *compounded* the Arbitrator's financial interest in the proceeding. These types of hearings would be characterized as the Arbitrator's "bread and butter" under *Brown v. Vance* (5th Cir. 1981) 637 F.2d 272, 276, thereby creating a further temptation to the Arbitrator "to enhance his income" by leaning in the direction of his Hospital clients.

V. Petitioner's Request for Relief from Hospital Peer Review Action is Reasonable and Based Upon Facts.

Respondents' Opposition Brief (page 20) states:

---

which Petitioner placed before the Appellate and California Supreme Court. Furthermore, at the time Petitioner brought this case to the California Supreme Court, *Yaqub* had become final law. Contrary to Respondents' claim (p.18, fn. 5), Petitioner fully argued the Arbitrator's financial interest bias in briefs (Appendix A-68; A-70) and at trial.

> "Petitioner never objected to the selection of the arbitrator, or that Respondent paid the arbitrator's fee, until after he had lost the arbitration. Had Petitioner believed that the selection[3] and payment was procedurally unfair, he should have voiced his before the conclusion of an arbitration...His failure to do so should result in his argument being waived."

This argument is invalid. As a matter of law, Respondent is estopped from imposing any waiver upon Petitioner for a condition known to Respondents, the knowledge of which Respondents denied to Petitioner. Indeed, Petitioner relied on the notion of fair play and full disclosure rules to trust that Respondent would not select an overtly biased arbitrator. It was not until the conclusion of the Arbitration that it became apparent that the Arbitrator had been biased by the fee arrangement and by his own interest in his career specialty of representing hospitals in peer review hearings. It was only upon receipt of the Arbitrator's Findings that Petitioner discovered that the Arbitrator had ignored all of the independent expert witnesses with supporting exhibits, who, *like the California Medical Board*, had found Petitioner to be within the community standard of care in all of the cases charged against him. (See Appendix B-10; B-11.)

Respondents could not misstate the truth more when they allege that "the Arbitrator's fees were not dependent on the arbitration's outcome." (Page 16) In fact, the Arbitrator (Daniel

---

[3] On page 20 Respondents claim the Arbitrator was "mutually selected", but on page 19 Respondents admit they "selected" the Arbitrator. As Petitioner argued at trial and in Briefs, Respondents chose an Arbitrator who represents hospitals in peer review hearings, and paid his fee 100%. That Petitioner's attorney agreed to the Arbitrator (after telephone voir dire without Petitioner's presence [Resp.29]) is irrelevant. First, Petitioner's attorney's negligence in permitting this Arbitrator to sit does not exonerate Respondents of their guilt in choosing an arbitrator known by Respondents to be biased in favor of Hospitals. *See, e.g. Hurtado v. Statewide Home Loan Co.* (1985) 167 Cal.App.3d 1019 (plaintiff's reliance upon mistaken conduct of his attorney does not forfeit plaintiff's rights under the law.) Second, Federal law requires disqualification of an adjudicator with a substantial pecuniary interest.

Willick's) fees for many years to come depended upon how he ruled. A ruling against Respondents would banish him from future work in his career specialty as a hearing officer who represents hospitals in peer review hearings.[4]

CONCLUSION

Indeed a veritable cornerstone of our democracy requires that no decisionmaker be permitted to financially gain by his or her own decisions. Yet, the state law as applied in this case permits that very injustice.

It is simple fact that Respondents were able to choose and pay an Arbitrator who had much to gain by ruling in Respondents favor, and did so. Petitioner was obviously abused in this process. "The unfairness that results from *biased* decisionmakers strikes so deeply at our sense of justice that it differs qualitatively from the injury that results from *insufficient* procedures." *Haas, supra* at 1036. In Justice Holmes' famous phrase, "even a dog distinguishes between being stumbled over and being kicked.'" (Holmes, The Common Law (1881) p. 3.)

Federal law and the U.S. Supreme Court precedent hold that direct and substantial pecuniary interest creates a constitutionally unacceptable risk of bias.

Petitioner respectfully asks this court to grant certiorari so that such abuse against physicians and others similarly situated not be permitted under the law.

Respectfully submitted,

ROBERT JAFFE, M.D.
Petitioner in Pro Se

---

[4] Time has borne this out. In the recent case *Mileikowsky, M.D. v. Tenet Healthsystem* (2005) 128 Cal.App.4th, 531, 565, the very same Arbitrator who presided over Petitioner's Hearing (Daniel Willick), was selected by Tenet Hospital to preside as hearing officer over Mileikowsky's peer review hearing and was accused of impermissible rulings in favor of his hospital client, Tenet.

5

Supreme Court, U.S.
FILED
OCT 20 2005
OFFICE OF THE CLERK

No. 04-1536

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT J. JAFFE, M.D.,

Petitioner,

vs.

KAISER FOUNDATION HOSPITAL, *et al.*,

Respondents.

On Petition For Writ of Certiorari
To the California Court of Appeal
Second Appellate District

PETITION FOR REHEARING

ROBERT J. JAFFE, M.D.
22141 Burbank Boulevard, #5
Woodland Hills, CA 91367
Telephone: (818) 489-4120

Petitioner in Pro Se

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

ROBERT J. JAFFE, M.D., Petitioner in pro se

KAISER FOUNDATION HOSPITAL, SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, KAISER HEALTH PLAN, INC., Respondents.

TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDING..... i

TABLE OF AUTHORITIES.....ii

INTRODUCTION..... 1

QUESTION PRESENTED FOR REHEARING 3

JURIDICTION 3

STATE COURTS MAY NOT DENY CITIZENS THEIR U.S. CONSTITUTIONALLY GUARANTEED RIGHTS 3

U.S. SUPREME COURT PRECEDENT CONTROLS OVER ISSUES OF FEDERAL LAW. 4

FEDERAL LAW AND U.S. SUPREME COURT PRECEDENT HOLD THAT AJUDICATORS WITH A "DIRECT, SUBSTANTIAL AND PECUNIARY INTEREST" IN A PROCEEDING CREATES A CONSTITUTIONALLY UNACCEPTABLE RISK OF BIAS.....5

CONCLUSION 10

CERTIFICATION

TABLE OF AUTHORITIES

CASES

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813,825-826 106S.Ct. 1580, 89 L.Ed. 2nd. 832 1986)..... .6, 7

Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).....6

Brown v. Vance, 637 F.2d 272, 283..... 8

TABLE OF AUTHORITIES – Continued Page

Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000).....4
Connally v. Georgia (1977), 249 [97 S.Ct. 546, 548, 50 L.Ed.2d 44].....7
Haas v. County of San Bernardino (2002) 27 Cal.4th 1017119 Cal.Rptr.2d 341 9
Hutto v. Davis, 454 U.S. 370, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982)..... 4
Gibson v. Berryhill, 411 U.S. 564, 579 [93 S.Ct. 1689, 1698].....7, 8
Mullaney v. Wilbur, 421 U.S. 684, 689, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).....4
In Re: Murchison, 349 U.S. 133 (1955).....8
Tumey v. Ohio (1927) 273 U.S. 510, 523 [47 S.Ct. 437, 441, 71 L.Ed. 749].....6, 7, 8, 9
Ward v. Village of Monroeville, 409 U.S. 57, 60 [93 S.Ct. 80, 83].....6, 7, 8, 9
Withrow v. Larkin, supra, 421 U.S. 35, 47, 95 S.Ct. 456, 43 L.Ed.2d 712 (1975)..... 6, 7
Yaqub v. Valley Memorial Healthcare System, (2004) 122 Cal.App.4th, 18 Cal.Rptr. 3d 780 9

UNITED STATES CONSTITUTION

United States Constitution, Article VI.....3
United States Constitution, Fourteenth Amendment..2, 3, 5, 6

RULES OF THE U.S. SUPREME COURT

U. S. Supreme Court Rule 44 3

FEDERAL STATUTES

42 USC § 11112, *et seq*.....1

CALIFORNIA STATUTES

California Business & Professions Code § 809, *et seq*..... .1

INTRODUCTION

This case arises from the action of Respondents, Kaiser Foundation Hospital, to terminate Petitioner's hospital staff privileges despite all of the objective evidence placed before the hospital and contrary to the findings of the California Medical Board.

Petitioner is a board-certified internist. From 1977 to 1994, he was an attending physician with Kaiser Foundation Hospital, and was a partner with the hospital's affiliated Southern California Permanente Medical Group for 17 years.

In April of 1995, Respondent Kaiser Foundation Hospital began a "formal hearing" to decide whether Petitioner's medical staff privileges would be terminated. California Business & Professions Code 809, *et seq.* and Federal Law (42 U.S.C. 11112, *et seq.*), require that when licensed physicians' privileges are subject to termination, the physician is entitled to a hearing that complies with fair procedure and due process. This hearing was held before an arbitrator who acted as hearing officer, fact finder and decision-maker, *despite* the fact that the arbitrator had a direct, personal, substantial and pecuniary interest in the proceeding. Respondents, Kaiser Foundation Hospital, had chosen the arbitrator and paid the arbitrator's fee 100 percent over the entire 32-hearing sessions spanning 2 ½ years, thereby making the arbitrator's financial interest, "direct, personal substantial and pecuniary", as characterized by U.S. Supreme Court precedent.

U.S. Supreme Court precedent on this specific issue holds that a "direct, personal substantial and pecuniary interest" in a proceeding creates a bias that is too high to be constitutionally tolerable.

Indeed, the arbitrator in this matter upheld Respondents' decision to terminate Petitioner's privileges contrary to the objective independent expert testimony, supporting authoritative literature entered as exhibits, and the California Medical Board which twice affirmed that Petitioner was within the community standard of care in all the cases charged against him. (See Appendix B-10 and B-11.)

Petitioner brought the issue before the California state courts that he was denied due process of the law because the arbitrator had been biased by his financial interest.

The state courts' decisions upheld the Hospital's action to terminate Petitioner's hospital privileges, *despite* the fact that the arbitrator had a direct, substantial and pecuniary interest in the proceeding. In doing so the courts ignored U.S. Supreme Court precedent that holds that an adjudicator with a "direct, substantial and pecuniary interest" in a proceeding possesses a bias that is too high to be constitutionally tolerable, requiring disqualification of the adjudicator.

The state court decisions also ignored the Fourteenth Amendment to the U.S. Constitution that *guarantees* that no state shall deprive a citizen of liberty or property without due process of law.

The state courts have decided a federal matter in a manner that *denies* a U.S. Constitutionally-guaranteed right and in a manner that directly conflicts with U.S. Supreme Court precedent.

QUESTION PRESENTED FOR REHEARING

If state courts decide a federal issue in a manner that denies a U.S. Constitutionally-guaranteed right and in a manner that *conflicts directly* with U.S. Supreme Court precedent on the specific issue at hand, will the guarantees of the U.S. Constitution and the U.S. Supreme Court precedent then *control*?

JURISDICTION

Petitioner's Petition for Rehearing is proper per Rule 44 of the U.S. Supreme Court Rules in that the grounds for this Petition for Rehearing are limited to circumstances of substantial "controlling effect not previously presented". This Petition is based on the controlling effect of the U.S. Constitution on the issue at hand, and the controlling effect of the U.S. Supreme Court's precedent on the issue at hand. The U.S. Constitution and U.S. Supreme Court precedent must control over the state courts' contrary decisions.

STATE COURTS MAY NOT DENY CITIZENS THEIR U.S. CONSTITUTIONALLY GUARANTEED RIGHTS

State courts have no discretion to deny citizens' rights guaranteed under the U.S. Constitution. All judges take an oath to uphold the U.S. Constitution and are bound to abide by it. Article VI of the U.S. Constitution, the "Supremacy Clause" states: "This *Constitution*, and the *Laws of the United States* ... shall be the *supreme Law of the Land*; and the *Judges in every State shall be bound thereby*..." (Emphasis added.)

The Fourteenth Amendment to the U.S. Constitution guarantees the right to *due process* before a state can take away a citizen's property or liberty.

U.S. SUPREME COURT PRECEDENT CONTROLS OVER ISSUES OF FEDERAL LAW.

On an issue of *federal law*, a state court is *bound* by the decisions of the United States Supreme Court. The decisions of the United States Supreme Court are the final authority of precedent on issues of federal law. The decisions of the United States Supreme Court on federal law issues are binding precedent on all courts throughout the country, both state and federal.

The issue Petitioner placed before the state courts and the U.S. Supreme Court is an issue of *federal law* because it involves a U.S. Constitutionally-guaranteed right, *due process*.

State courts are *not* free to ignore U.S. Supreme Court precedent on federal law issues. Indeed, as to U.S. Supreme Court precedent, "[u]nless we wish anarchy to prevail within the federal judicial system, a precedent of this court must be followed . . ." *Hutto v. Davis*, 454 U.S. 370, 375, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982).

In *Mullaney v. Wilbur*, 421 U.S. 684, 689, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), the U.S. Supreme Court quoted a federal appellate court's ruling stating "Although recognizing that 'within broad limits a state court must be the one to interpret its own laws,' the court nevertheless ruled that 'a totally unsupportable construction which leads to an invasion of constitutional due process is a *federal matter*.'" (Emphasis added.)

Additionally, if a state court is interpreting a state law *in a manner that violates federal law*, then the federal court's decisions *will* be binding. *Bush v. Gore*, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000).

Thus, the state courts in the instant matter, had no discretion, nor authority, to ignore the guarantees of the U.S. Constitution, and the U.S. Supreme Court precedent that expressly addresses the instant issue as put forth below.

FEDERAL LAW AND U.S. SUPREME COURT PRECEDENT HOLD THAT AJUDICATORS WITH A "DIRECT, SUBSTANTIAL AND PECUNIARY INTEREST" IN A PROCEEDING POSSESS A CONSTITUTIONALLY UNACCEPTABLE RISK OF BIAS.

The issue of Petitioner's Writ of Certiorari is whether the lower courts' rulings that *permit* an adjudicator with a direct, personal, substantial, and pecuniary interest to preside over a hearing affecting a physician's right to practice his profession, are in conflict with Federal law and U.S. Supreme Court precedent, and repugnant to the Constitution of the United States as violating physicians' rights to impartial adjudicators pursuant to constitutional guarantees of due process and fair procedure.

The matter Petitioner brings before this Court has been considered by the California courts. The California state courts' rulings violate the U.S. Constitution and are in direct conflict with U.S. Supreme Court precedent.

The Fourteenth Amendment to the U.S. Constitution states, in pertinent part, that no state[1] can deprive a citizen of liberty or property without due process.

---

[1] See Petitioner's Reply to Respondents' Opposition to Petition for Writ of Certiorari, (pages 1-4) establishing that "State Action", a necessary element to invoke the Fourteenth Amendment, was present in Respondents' revocation of Petitioner's Hospital's privileges in this case, as Respondents were state actors.

The U.S. Supreme Court precedent on this issue holds that an adjudicator with a "direct, personal, substantial and pecuniary" interest in the outcome of a proceeding creates the probability of actual bias that is too high to be constitutionally tolerable. *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 456, 43 L.Ed.2d 712 (1975); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825-826, 106S.Ct. 1580, 89 L.Ed. 2 nd. 832 (1986), quoting *Tumey v. Ohio* (1927) 273 U.S. 510, 523 [47 S.Ct. 437, 441, 71 L.Ed. 749] and *Ward v. Village of Monroeville*, 409 U.S. 57, 60 [93 S.Ct. 80, 83].

This Court requires disqualification of adjudicators only for financial interests that it has characterized as "direct, personal, substantial, [and] pecuniary," rather than "slight." (*Aetna Life Ins. Co. v. Lavoie, supra.* 475 U.S. 813, 825-826; *Ward, supra*, 409 U.S. 57, 60 and *Tumey, supra*, 273 U.S. 510, 523.) (Emphasis added.)

The adjudicator in this matter, who decided whether Petitioner would be deprived of his property right (his hospital privileges)[2], and his liberty right[3] was paid 100 percent by the hospital over the entire 32 hearing-sessions spanning 2 ½ years. U.S. Supreme Court precedent holds that an adjudicator with such a "*direct, personal, substantial, and pecuniary interest*" in a proceeding deprives a party of due process of law and violates the Fourteenth Amendment.

---

[2] See Petitioner's Reply to Respondents' Opposition to Petition for Writ of Certiorari (pages 4-5) where Petitioner cited *both* state and federal law holding that hospital privileges *when "already-licensed"* are a property right. (*Lowe v. Scott*, 959 F.2d 323 (1st Cir. 1992); *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)

[3] See Petitioner's Reply to Respondents' Opposition to Petition for Writ of Certiorari (pages 4-5) where Petitioner established that he also had a liberty interest insofar as Respondents' action seriously damaged his professional reputation and compromised his *future* employment prospects because of the required reporting to state and federal data banks and the required disclosure on all future hospital and staff employment applications. (See *Board of Regents, supra*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).)

(*Aetna Life Ins. Co. v. Lavoie, supra.* 475 U.S. 813, 825-826; *Tumey v. Ohio* (1927) 273 U.S. 510, 523 [47 S.Ct. 437, 441, 71 L.Ed. 749] and *Ward v. Village of Monroeville,* 409 U.S. 57, 60 [93 S.Ct. 80, 83]).

The California state courts' rulings ignored both the U.S. Constitutional guarantee of Due Process and the U.S. Supreme Court precedent on the issue at hand.

Contrary to U.S. Supreme Court precedent, the state courts in this matter ruled improperly that in order to prevail on a claim of bias arising from financial interest, Petitioner must show *actual* bias on the part of the arbitrator and that the financial interest must be based on the "*outcome*" of the hearing. (See Opinion Appendix B-5 and B-6).

These rulings are in *direct conflict* to U.S. Supreme Court precedent. The U.S. Supreme Court has repeatedly and unambiguously held that courts, when faced with a claim of bias arising from financial interest, do *not* require proof of a direct pecuniary interest in the "*outcome*" of a particular case, or proof of "*actual*" judicial prejudice, nor do they decide whether the adjudicator was in fact influenced. The standard continues instead to be that set out in *Tumey v. Ohio* (1927) 273 U.S. 510, 523 [47 S.Ct. 437, 441, 71 L.Ed. 749] and *Ward v. Village of Monroeville,* 409 U.S. 57, 60 [93 S.Ct. 80, 83]), namely whether a fee system presents a '<u>possible temptation to the average man as judge to forget the burden of proof ... or which might lead him not to hold the balance nice, clear and true.</u>'" (Emphasis added.) *See also Aetna, supra,* 475 U.S. at pp. 824-825 [106 S.Ct. at pp. 1586-1587]; *Connally v. Georgia* (1977), 249 [97 S.Ct. 546, 548, 50 L.Ed.2d 444]; and *Withrow, supra,* 421 U.S. 35, 47, 95 S.Ct. 456, 43 L.Ed.2d 712 (1975).

The rule disqualifying adjudicators with *pecuniary interests* applies with full force to *administrative hearings*. In this context, this Court has applied the same rules to *administrative hearing officers and judges alike*. *Gibson v. Berryhill*, 411 U.S. at p. 579 [93 S.Ct. at p. 1698].) This Court has stated: "It is [Page 27 Cal.4th 1027] sufficiently clear from our cases that those with *substantial pecuniary interest* in legal proceedings should not adjudicate these disputes." (Emphasis added.) (*Gibson, supra*, 411 U.S. 564, 57.) An adjudicator with a *financial interest* in a proceeding presents a "situation[] . . . in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow, supra*, 421 U.S. 35, 47, 95 S.Ct. 456, 43 L.Ed.2d 712 (1975).

"A fair trial in a fair tribunal is a *basic* requirement of *due process*." *In Re: Murchison*, 349 U.S. 133 (1955). "Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, *denies* the latter *due process* of law." (Emphasis added) *In Re Murchison, supra* quoting *Tumey v. Ohio*, 273 U.S. 510, 532 .] Accordingly, "No man is permitted to try cases where he has an interest in the outcome . . . " (Id.)

In addition to violating due process and conflicting with U.S. Supreme Court Precedent, the California state courts' rulings in the instant case that Petitioner must show actual bias and financial interest based on the "outcome" of the hearing in order to prevail on a claim of bias arising from financial interest, are contrary to the holding of the *Federal Court of Appeal*, Fifth Circuit. *See, e.g. Brown v. Vance*, 637 F.2d 272, 283 ("we need find no instance of actual judicial bias to hold the fee system constitutionally infirm)."
The court wrote, "the test is whether a fee system presents a 'possible temptation to the average man as judge to forget the

burden of proof . . . or which might lead him not to hold the balance nice, clear and true . . .'" (*Id.* at p. 282, quoting *Tumey, supra*, 532 [47 S.Ct. 437, 444], and *Ward, supra*, 60 [93 S.Ct. 80, 83].)

Additionally, the California state court rulings in the instant case are contrary to another recent California Appellate Court ruling, *Yaqub, M.D. v. Valley Memorial Healthcare System*, (2004) 122 Cal.App.4th, 18 Cal.Rptr. 3d 780. In *Yaqub*, the court of appeal, Sixth Appellate District, held that a hearing officer with a direct, substantial, personal and pecuniary interest in the proceeding was *disqualified* from presiding over the administrative hearing to decide whether the physician's hospital privileges would be revoked.[4] The *Yaqub* decision followed U.S. Supreme Court precedent, citing *Haas v. County of San Bernardino* (2002) 27 Cal.App.4th 1017, 119 Cal.Rptr.2d 341, which cited *Tumey* and *Ward, supra.*

However, in the *instant* case, the California Supreme Court ignored the ruling in *Yaqub* and the guarantees of the U.S. Constitution and the U.S. Supreme Court precedent on the issue at hand. The California Supreme Court refused to grant review to reconsider the lower courts' (Second Appellate District) rulings that *permitted* an arbitrator with an obvious direct, substantial, personal and pecuniary interest in the proceeding to decide whether Petitioner's hospital privileges would be revoked.

---

[4] As in *Yaqub*, the hearing officer in the instant case had an additional interest in the outcome of the proceeding. The arbitrator is an attorney who represents hospitals and who is employed by hospitals as a hearing officer, thereby increasing his risk for bias in ruling for the hospital. (See Petitioner's Petition for Writ of Certiorari p. 14 and Reply p. 9).

In permitting an adjudicator with a "direct, personal, substantial, and pecuniary interest" to rule on whether Petitioner would be deprived of his property and liberty rights, the California state courts acted contrary to the U.S. Constitutional *guarantee* that no state shall deprive a citizen of property or liberty without the due process of law, and contrary to U.S. Supreme Court Precedent and Federal law on this specific issue.

When the U.S. Supreme Court directly speaks on a specific issue and, through its well-settled precedent, emphatically decides it a U.S. Constitutional violation, a state court should not be allowed to rule to the contrary.

CONCLUSION

For the reasons set forth above, and for the reason of such controlling and substantial grounds not previously presented, namely the controlling effect of the U.S. Constitution and U.S. Supreme Court precedent over the state courts' contrary decisions on federal issues, Petitioner requests that the U.S. Supreme Court accept and grant this Petition for Rehearing.

Dated: October 26, 2005

Respectfully submitted,
/s/ Robert J. Jaffe, M.D.
ROBERT J. JAFFE, M.D.
Petitioner in Pro Se

CERTIFICATION

I, Robert J. Jaffe, M.D., Petitioner in *pro se*, hereby certify that the grounds for this Petition for Rehearing is limited to the grounds specified in U.S. Supreme Court Rule 44, "intervening circumstances of a substantial or controlling effect not previously presented", namely the controlling effect of the U.S. Constitution on the issue at hand, and the controlling effect of the U.S. Supreme Court's precedent on the issue at hand.

I, Robert J. Jaffe, M.D., hereby further certify that this Petition for Rehearing is presented in good faith and not for the purpose of delay.

DATED: October 25, 2005

ROBERT J. JAFFE, M.D.
Petitioner in Pro Se